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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

**NORTHWEST AIRLINES, INC.,**

*Petitioner,*

**v.**

**MARY P. LAFFEY, et al.,**

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**  
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Northwest Airlines, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 20, 1976.

**OPINIONS BELOW**

The opinions and order of the district court, *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C.

1973), and *Laffey v. Northwest Airlines, Inc.*, 374 F. Supp. 1382 (D.D.C. 1974), and the opinion of the court of appeals, which is not yet reported, are reprinted in a separate Appendix to this Petition (Pet. App. A, B, and C, respectively). By order entered on September 8, 1977 (Pet. App. E), the court of appeals amended its October 20, 1976 opinion in several respects.

### JURISDICTION

The judgment of the court of appeals (Pet. App. D) affirming in part and vacating in part the judgment of the district court was entered on October 20, 1976. A timely petition for rehearing was denied on September 8, 1977 (Pet. App. F). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

### QUESTIONS PRESENTED

1. Whether the existence of a *bona fide* collective bargaining agreement treating two jobs as different and establishing wage differentials between them precludes a finding that the jobs are equal and that the employer has "discriminate[d] . . . on the basis of sex" within the meaning of the Equal Pay Act.

2. Whether one job can be found to require "equal skill, effort, and responsibility" with another job within the meaning of the Equal Pay Act where the first position is defined as a supervisory job and employees

in that position exercise supervisory responsibility over employees in the other.

3. Whether a violation of the Equal Pay Act is "willful," thereby extending the period of backpay recovery, solely because an employer has acted consciously in maintaining job classifications, but has done so with a reasonable, good faith belief that his actions are entirely lawful.

4. Whether, as the court below held, the industry-wide existence of an employment practice and the approval of the practice in a collective bargaining agreement are irrelevant as a matter of law to a finding that the employer had acted in "good faith," thereby justifying the court's exercise of statutory discretion under the Equal Pay Act not to assess double damages.

5. Whether cases pending in court at the time of the 1972 amendments to Title VII of the Civil Rights Act of 1964 are governed by the amendment limiting backpay awards to two years prior to the filing of charges with the Equal Employment Opportunity Commission.

6. Whether the courts may make an "equitable modification" to the statutory "jurisdictional prerequisite" prohibiting an employee from bringing a judicial action unless the employee filed charges with the Equal Employment Opportunity Commission within 90 days after the allegedly discriminatory practice.

## STATUTORY PROVISIONS INVOLVED

Set forth in an appendix at the end of this Petition are the pertinent provisions of the statutes involved: the Equal Pay Act of 1963, 29 U.S.C. §206(d), the Fair Labor Standards Act, 29 U.S.C. §§216(b), 251(a), 255(a), 260, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*

## STATEMENT

### 1. Introduction

This case involves one of the largest judgments—and perhaps *the* largest—ever rendered under the Equal Pay Act or Title VII of the Civil Rights Act because of alleged sex discrimination. Under the decision below, petitioner Northwest Airlines, Inc. must retroactively pay *all* female cabin attendants at the higher rate previously established by collective bargaining agreement for less than five percent of its cabin attendants. Under the liability standards fashioned by the courts below, Northwest faces a backpay award that ultimately may reach \$50 million.

Northwest has employed two types of cabin attendants in its airline passenger operations. One class consists of female “stewardesses” and male “flight service attendants” (“FSA’s”), now called “stewards.” The other class, higher-rated and generally higher paid, consists of “pursers.” Despite a history of nearly thirty years during which Northwest, its employees, and their female-dominated union all have manifested the under-

standing that the purser position is different from and superior to that of other cabin attendants, respondent stewardesses brought this action under the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, claiming job discrimination because stewardesses (as well as male FSA’s) were paid less than pursers and because, until the late 1960’s, only men were eligible to be pursers.

Northwest does not contest the holding that the pre-1970 obstacles to promotion of women to the position of purser violated Title VII. What Northwest does contest are the legal standards applied in determining that the positions of purser and stewardess are substantially identical and that the payment of pursers at a rate greater than that paid stewardesses therefore constituted discrimination “on the basis of sex” in violation of the Equal Pay Act. Northwest also challenges the holdings under which double damages may be assessed and the backpay period extended from two to three years.

### 2. Northwest’s Aircraft Cabin Attendants

Northwest first began passenger operations in 1927 with female cabin attendants called “stewardesses.” In 1947, when Northwest commenced international operations, it began to employ “pursers” who, in accordance with maritime tradition, were to exercise overall supervisory responsibility for passenger comfort and well-being. Because purser duties involved cargo handling and the procurement and loading of foodstuffs,

Northwest, like other airlines, followed the maritime tradition and limited its purser complement to men. The remainder of Northwest's cabin attendants included both men and women.<sup>1</sup> Beginning in 1949 and continuing with minor interruption until the present, Northwest has employed a limited number of male FSA's (or stewards) who by practice and by specification in collective bargaining agreements were generally to perform the same functions as stewardesses.

Since 1948 all cabin attendants (pursers, stewardesses, and FSA's) have been represented by a single labor union. Reflecting the preponderance of women cabin attendants, both union membership and union leadership always have been overwhelmingly female, with women often outnumbering men by a ratio of over fifteen to one. Indeed, several of the named plaintiffs in this action have been among the leaders of the cabin attendants' union.

Collective bargaining agreements negotiated between Northwest and the female-dominated union since the 1940's have contained distinct definitions of the responsibilities of stewardesses and pursers.<sup>2</sup> Although the negotiated job definitions of pursers and stewardesses reflect an overlap in duties, comparison of these definitions reveals that pursers have duties and responsibilities — notably supervisory — that are theirs

<sup>1</sup> For a more complete description of the reasons why the purser position was confined to men, see 366 F. Supp. at 772-773, Pet. App. 20a-21a, ¶37.

<sup>2</sup> 366 F. Supp. at 766, Pet. App. 6a-7a, ¶¶10-11. Effective with the 1951 collective bargaining agreement, FSA's were included in the "stewardess" definition.

alone.<sup>3</sup> The following features are unique to the description of the purser's job:

"'Flight Purser' means an employee *on the international division* whose work includes... responsibility for the preparation and completion of passenger, crew, and cargo manifests and other reports and documents as may be required by the Company or by law. A flight purser may be designated to perform necessary duties *in connection with flight cargo operations*, may be designated as being *in charge of other cabin attendants*, may be required to accept special assignments related to flight purser duties, and from time to time may be requested to participate in publicity and promotional assignments not in violation of any of the terms of this Agreement." 366 F. Supp. at 766, Pet. App. 6a-7a, ¶11 (emphasis added).

In 1964, one year after the enactment of the Equal Pay Act, the purser definition was reviewed at the union's behest. In the words of the union negotiators presenting the pact to the membership for ratification, the negotiated result was designed to provide "a more accurate description of a flight purser's duties and responsibilities" (Def. Ex. 248). The definition carried forward the unique reference to pursers' supervisory duties, as well as to their concentration on international flights and their participation in all-cargo operations.<sup>4</sup>

<sup>3</sup> Some of the key differences are discussed — but discounted — in the opinion of the court of appeals (Pet. App. 9c-16c).

<sup>4</sup> Significantly, until the filing of this action, every stewardess effort in the name of equal employment opportunity had been directed toward increasing stewardess access to the purser rolls, rather than toward abolishing the purser position or the pay differential. Of all the grievances filed during the course of union

(continued)

Northwest's cabin service manual, which prescribes all aspects of cabin service, describes a chain of command in which a purser, regardless of seniority, is at all times the cabin attendant in charge of overall cabin service whenever the flight carries a purser. Operating from the first class section of the aircraft, the purser exercises supervisory authority over all other cabin attendants, male or female, whether located in first class or tourist. Purser are ultimately responsible for all aspects of cabin service in aircraft that may hold hundreds of passengers.<sup>5</sup>

In contrast, on those flights, primarily domestic, for which pursers are unavailable or to which they are not assigned, the cabin attendant with the most seniority assumes responsibility for the coordination of all cabin service on that flight. Because flight schedules are chosen by stewardesses in accordance with their preferences on the basis of seniority, the cabin crew on any particular flight is likely to consist of cabin

*(footnote continued from preceding page)*

representation, not one was directed at the pay differential between pursers and stewardesses. Instead, in 1967 the collective bargaining agreement was amended to permit stewardesses to bid for purser vacancies as they arose.

<sup>5</sup> Purser receive special training during which their supervisory responsibilities are emphasized. As part of their supervisory duties, for example, pursers make periodic inspections throughout an aircraft in order to insure that cabin service is maintained at the proper level. Purser also may assign other crew members to their duty stations, and pursers are responsible for giving safety briefings to other crew members before overwater and other flights.

A stewardess or FSA serving as cabin attendant in tourist has more limited supervisory duties over only the other cabin attendants working there. See Pet. App. 14c-15c.

attendants with approximately equal lengths of service. Thus, while an individual stewardess may assume some supervisory responsibilities on a particular flight, those occasions are random and sporadic. In short, all pursers have formal, inherent supervisory authority, whereas only some stewardesses perform some supervisory duties on intermittent occasions.

### 3. The Decisions Below

Northwest acknowledged below that the custom of restricting purser positions to men prior to the 1967 amendments to the collective bargaining contract, although understandable from an historical perspective, was inconsistent with Title VII. But the stewardess class argued successfully, if somewhat inconsistently, that the job to which they were ineligible for promotion was in fact "equal" to the one they held, so that the payment of higher compensation to pursers for "equal" work constituted discrimination on the basis of sex in violation of the Equal Pay Act and the cognate provisions of Title VII. The district court, while conceding the "reasonableness" of the historic differentiation, concluded that the purser and stewardess jobs were equal. As a result, the vast majority of cabin attendants — other than male FSA's — were declared entitled to the higher pay that had been regularly negotiated as appropriate only for the relatively small number of pursers.

The district court found the Equal Pay Act violation "willful," thus establishing the back-pay period as three years rather than two, see 29 U.S.C. § 255(a), but

simultaneously held that Northwest had acted in "good faith," so that statutory double damages were not warranted. *See* 29 U.S.C. §§216(b), 260. The court also found that the proper backpay period under Title VII was two years prior to the filing of charges with the EEOC. Cross-appeals followed.

The court of appeals affirmed the basic holding of liability, concluding that the district court's "factual" finding of job equality was not "clearly erroneous." The court discounted the significance of the pursers' supervisory responsibilities by reasoning that the supervisory functions were "less important than, and require no greater skill, effort, or responsibility, than the other functions assigned to all cabin attendants" (Pet. App. 37c-38c; emphasis added).

In addition, at each opportunity the court adopted standards and tests that would have the effect of inflating backpay awards and imposing the highest conceivable liability. Notwithstanding the established meaning of "willful" as a term of art requiring an intentional violation of a known legal duty, the court below decided that the Equal Pay Act must be "liberally construed" (Pet. App. 57c) and held that an "employer's noncompliance [with the Act] is 'willfull' when he is cognizant of an appreciable possibility that he may be subject to the statutory requirement" or "consciously and voluntarily charts a course which turns out to be wrong" (Pet. App. 58c-59c). The court of appeals thus affirmed the award of three years' backpay, rather than two, under 29 U.S.C. §255(a) (Pet. App. 60c-62c).

The court then overturned the district court's exercise of discretion in refusing to award double

damages, rejecting the lower court's finding that Northwest had acted in "good faith." The district court had found that:

"[Northwest] did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point." 374 F. Supp. at 1390, Pet. App. 1b-2b.

But, in a ruling that effectively mandates the award of double damages for every successful Equal Pay Act claim, the court of appeals held that the factors cited by the district court were legally insufficient to support its finding of petitioner's good faith. The court mandated a new test: "legal uncertainty . . . must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice" (Pet. App. 68c).

With regard to the backpay period under Title VII, the court of appeals held that the 1972 amendment to Title VII, 42 U.S.C. §2000e-5(g), which limits backpay liability to the two-year period prior to the filing of charges with the EEOC, does not apply to the instant case, because the complaint was filed in court before the amendment was enacted. Although the two-year limitation had been added to Title VII to avoid

imposition of "an horrendous potential liability," 147 Cong. Rec. 31973 (1971), the court held that the district court was forbidden even to draw upon the policy reflected in the 1972 amendment in exercising its residual discretion to determine the appropriate backpay period.

Finally, the court of appeals held that the statutory prerequisites for filing Title VII actions, 42 U.S.C. § 2000e-5(d), are not jurisdictional and ruled that Northwest was estopped from asserting that the Title VII class could not include those stewardesses whose employment with Northwest had terminated more than 90 days prior to the filing of charges with the EEOC. While conceding that this Court and other courts of appeals have "referred" to the EEOC filing requirement as "jurisdictional," the court below declined to treat the requirement as jurisdictional and instead held that "the time provisions of Title VII are subject to equitable modification" (Pet. App. 86c-89c).

## REASONS FOR GRANTING THE WRIT

In 1947 Congress declared that the Fair Labor Standards Act had been "interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation..." Congress concluded that these interpretations, if not changed by legislation, would "seriously impair the capital resources" of many employers, would permit employees to receive "windfall payments" beyond the rewards

"included in their agreed rates of pay," and would impair "voluntary collective bargaining." 29 U.S.C. § 251(a) (Congressional findings and declaration of policy).

The very consequences Congress sought to avoid by enacting amendatory legislation (including provisions at issue in this litigation) are produced by the decision below. The court below concluded that two different positions — pursers and stewardesses — that have been recognized in collective bargaining agreements dating back more than 20 years as distinct positions having different responsibilities are nevertheless "equal" and thus require identical pay. The result is that Northwest must retroactively pay its stewardesses, who have outnumbered the higher-paid pursers by more than twenty to one, a windfall that may aggregate as much as \$50 million — a bonus never contemplated by either side at the time the collective bargaining agreements were made or the employees' work performed.<sup>6</sup>

## I

This case presents a critical, unresolved issue under the Equal Pay Act: whether that Act can apply to job differentials established without discriminatory intent

<sup>6</sup> At least two other consolidated class actions against another airline raising virtually identical issues under Title VII and the Equal Pay Act are awaiting decision in the Southern District of New York. See generally *Maguire v. Trans World Airlines, Inc.*, 403 F. Supp. 734 (S.D.N.Y. 1975); *id.*, 55 F.R.D. 48 (S.D.N.Y. 1972); *De Figueiredo v. Trans World Airlines, Inc.*, 55 F.R.D. 44 (S.D.N.Y. 1971); *id.*, 322 F. Supp. 1384 (S.D.N.Y. 1971).

and in accordance with a *bona fide* collective bargaining agreement treating the jobs as different.

The Equal Pay Act of 1963, 29 U.S.C. §206(d)(1), prohibits an employer from discriminating *on the basis of sex* by paying men and women different wages for the same work. As defined in the Act, one job is "equal" to another only when it "requires equal skill, effort, and responsibility" and is "performed under similar working conditions." The Act does not forbid paying men and women different wages for different jobs; nor does it prevent wage differentials for what may be the same work where those differentials are based on a consideration other than sex, such as a *bona fide* job evaluation plan indicating the jobs are different. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 195-205 (1974); *Cayce v. Adams*, \_\_\_\_ F. Supp. \_\_\_\_ (C.A. No. 77-0049) (D.D.C. Oct. 21, 1977) (slip op. at 2 n.1, 4-5) (Gesell, J.); cf. *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976) ("it is a finding of *sex-based* discrimination that must trigger . . . the finding of an unlawful employment practice under [Title VII of the Civil Rights Act of 1964]") (emphasis added).

The issue presented by this case is whether a *bona fide* collective bargaining agreement defining and treating two jobs differently is tantamount to a *bona fide* job evaluation plan and, thus, under the principles established in *Corning Glass*, precludes a finding that there was a violation of the Equal Pay Act. In short, can a court, despite a *bona fide* contractual understanding that two jobs are different, determine that the payment of different wages is "discrimination based on sex," solely because the court concludes that the *bona fide* understanding was wrong?

As this Court explained in *Corning Glass*, Congress did not intend in the Equal Pay Act to impose civil liability on an employer who, acting in good faith, premises a wage differential on his determination that two jobs are different, even if his conclusion is mistaken. Only differentials "based on sex" were to be forbidden, not differentials based on a *bona fide* determination that the jobs do not involve "equal work" requiring "equal skill, effort, and responsibility" under "similar working conditions." 29 U.S.C. §206(d)(1); see *Corning Glass Works v. Brennan*, *supra*, 417 U.S. at 199-204.

Reviewing the legislative history of the Equal Pay Act in *Corning Glass*, this Court noted that Congress rejected early versions of the bill that would have permitted "second-guessing the validity of a company's job evaluation system." 417 U.S. at 200. It is precisely this kind of "second-guessing" that underlies the decisions below. The district court, with the approval of the court of appeals, independently analyzed the "equality" of the jobs of purser and stewardess, despite the collective bargaining agreement. See Pet. App. 7c-16c, 33c-39c. That approach flatly conflicts with the requirements of the Act and the premise of this Court's decision in *Corning Glass*.

If wage differentials based upon a *bona fide* job evaluation plan developed unilaterally by the employer are outside the purview of the Act, as this Court held in *Corning Glass*, *supra*, 417 U.S. at 201, then *a fortiori* the distinctions in job specifications and wages incorporated in a formal union contract after good faith adversary bargaining must be immune from a later charge that the differentials are based on sex rather

than perceived differences between the jobs. Cf. *Trans World Airlines, Inc. v. Hardison*, 97 S. Ct. 2264, 2274-76 (1977), where the Court held that an employer's compliance with the job-assignment and seniority provisions of a *bona fide* collective bargaining agreement precluded a finding that the employer had discriminated against an employee on the basis of religion in violation of Title VII of the Civil Rights Act. As one of the sponsors of the Equal Pay Act explained: "[The Act] is not intended to compare unrelated jobs, or jobs that have been *historically and normally considered by the industry to be different*." 109 Cong. Rec. 9196 (1963) (remarks of Rep. Frelinghuysen) (emphasis added).

The court below discounted the legal significance of the collective bargaining agreement here by observing that "union activity cannot strip individual employees of the opportunity to seek vindication of their statutory entitlements in court" (Pet. App. 25c). Just as in *Trans World Airlines, Inc. v. Hardison*, *supra*, 97 S. Ct. at 2274, this comment begs the question. Northwest does not claim that union complicity in illegal activity can "strip" employees of their statutory rights. Rather, our position is that the *bona fide* agreement between Northwest and the plaintiffs' union, establishing the positions of stewardess and purser as different jobs entitled to different pay, demonstrates that the pay differential was based on an understanding that the jobs were not equal and thus could not have been and was not "based on" sex.

In fulfilling its obligation of non-discriminatory representation of all its members, a union, by agreeing to a contract, confirms the *bona fides* of the

employer's job evaluations. That general principle applies with special force in this case where at all times the union was dominated by female stewardesses, the very class that now claims to be the victim of sex-based discrimination. There is no question in this case about the existence and *bona fides* of this understanding. The district court expressly found that Northwest:

"did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise." 374 F. Supp. at 1390, Pet. App. 1b.<sup>7</sup>

Once Northwest made the showing that it believed the jobs were not equal and that it was complying with a collective bargaining agreement, it was the plaintiffs' burden to show that the collective bargaining agreement was a mere pretext to cover a discriminatory intent. Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-807 (1973). Since there was no such showing here,<sup>8</sup> Northwest's understanding, whether or not

<sup>7</sup>The findings of fact supporting this conclusion were not challenged by the court of appeals.

<sup>8</sup>The respondent stewardesses did not allege, let alone present evidence, that their union had unfairly or discriminatorily represented them. Nor could they have, for as the district court found, the successor unions that represented all cabin attendants, including pursers, were "predominantly female, so that females always have and still do possess a clear numerical superiority over males in the affairs of the class or craft and the union representative." 366 F. Supp. at 765-66, Pet. App. 5a, ¶ 8.

There is simply no support for the speculation by the court of appeals that, in contract after contract, the respondents' union negotiators understood the purser and stewardess jobs as equal, but acquiesced in maintaining pay differentials "in order to achieve more pressing bargaining objectives" (Pet. App. 25c).

erroneous, establishes as a matter of law that the pay differentials were based on the inequality of the jobs and that Northwest did not "discriminate . . . on the basis of sex" within the meaning of the Equal Pay Act.

The core error in the approach of the courts below was the failure to insist on proof of an intent to discriminate on the basis of sex. As this Court has recently emphasized in considering Title VII, whose proscriptive language is virtually identical to that of the Equal Pay Act, adequate "proof of *discriminatory motive is critical*" where plaintiffs claim that they have been the victims of "discrimination" based on "disparate treatment." *International Brotherhood of Teamsters v. United States*, 97 S. Ct. 1843, 1854 n.15 (1977) (emphasis added). The very concept of "discrimination," whether constitutional or statutory, necessarily implies some notion of intent to distinguish on the prohibited "basis."<sup>9</sup>

Plaintiffs presented no evidence that the pay differential between the purser and stewardess positions had been established with discriminatory intent. Moreover, in the circumstances of this case, where male FSA's were paid at the same lower rate as stewardesses, discriminatory intent could not be inferred "from the mere fact of differences in treatment." See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977); cf. *Hazelwood*

<sup>9</sup>See, e.g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-66 (1977); *General Electric Co. v. Gilbert*, *supra*, 429 U.S. at 137; cf. *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at 804-806.

*School District v. United States*, 97 S. Ct. 2736, 2742-43 (1977).

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1977), the Court held that a distinction between "pregnant women and non-pregnant persons" is not sex-based "discrimination" for purposes of Title VII. See also *Geduldig v. Aiello*, 417 U.S. 484 (1974). Similarly, in *United Airlines, Inc. v. Evans*, 97 S. Ct. 1885, 1888-89 (1977), the Court held that, where an airline treated both men and women alike in computing seniority and prior-service credit, even though other male employees obtained other advantages, the women could not establish that the differentials were "on the basis of sex" within the meaning of Title VII. So too, in the absence of proof of an actual intent to discriminate, Northwest's job distinction between (a) male pursers and (b) male and female cabin attendants cannot be *sex* discrimination under the Equal Pay Act. Cf. *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1170 n.4 (3d Cir. 1977).

The court below erred in reading the notion of discriminatory intent out of the Equal Pay Act.<sup>10</sup> Both this general issue and the particular significance of *bona fide* collective bargaining agreements in suits under the

<sup>10</sup>The court of appeals also erred in holding summarily (Pet. App. 49c) that the pay differential between pursers and stewardesses violated Title VII as well as the Equal Pay Act. Under Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), a pay differential that is legal under the Equal Pay Act cannot constitute a violation of Title VII. See *General Electric Co. v. Gilbert*, *supra*, 429 U.S. at 143-44. If the pay differential here did not violate the Equal Pay Act, the holding below that the differential violated Title VII also must be reversed.

Equal Pay Act raise fundamental questions of general application to all employers and employees.<sup>11</sup>

## II

The Equal Pay Act prohibits sex-based employment discrimination in the form of unequal pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility..." 29 U.S.C. § 206(d)(1). In concluding that pursers and stewardesses perform "equal work," the court of appeals discounted the significance of the added supervisory responsibility

<sup>11</sup>There is a related question about the effect of the collective bargaining agreement on the extent of the purser/stewardess differential that could be "based on sex." The job definition in the contract (see p. 7, *supra*) identifies a purser as an employee "on the international division," and virtually all pursers flew, in accordance with tradition, on international flights or transoceanic flights (or military charters). 366 F. Supp. at 776-78, Pet. App. 28a-31a, ¶ 41; Plaintiffs' Exh. 500, J.A. A-172. Under the collective bargaining contract, a stewardess similarly engaged in "foreign flying" received a \$77 per month supplement.

The district court held that, in equalizing the pay and computing the stewardesses' backpay entitlement, stewardesses who had received the foreign flying supplements should have those amounts deducted from the differential, thus depriving them of the premium they earned over domestic stewardesses. See 374 F. Supp. at 1385-1386, Pet. App. 6b-9b, ¶¶ 5(a), 6(a), 7(a). But to the extent the contract established that the "foreign flying" component of the cabin attendants' job was worth about \$77 per month, that figure should have been used to reduce the differential between pursers and domestic stewardesses.

possessed and exercised by pursers.<sup>12</sup> This holding raises a fundamental issue concerning the interpretation of the "equal responsibility" element of the Act's focus on "equal work."

Congress carefully chose the relatively narrow test of "equal work" rather than "comparable work" (a phrase which had appeared in earlier drafts of the Equal Pay Act) in order to ensure that "the jobs involved should be virtually identical..." 109 Cong. Rec. 8866, 8913-17, 9192-9218, 9761-62 (1963); see *Angelo v. Bacharach Instrument Co.*, *supra*, 555 F.2d at 1173-75; *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1258 (5th Cir. 1972). The holding by the court of appeals in this case improperly resurrects the concept of comparability.

Although much of the work performed by all cabin attendants on a flight is similar, pursers possess and exercise supervisory authority over other cabin attendants. 366 F. Supp. at 785-786, Pet. App. 48a, 50a-51a,

<sup>12</sup>The court below expressly applied the "clearly erroneous" standard in deciding that the supervisory duties of pursers required "no greater skill, effort or responsibility than the other functions assigned to all cabin attendants" (Pet. App. 38c). That approach conflicts with the decisions of other courts of appeals holding that the "equal work" issue is a mixed question of fact and law that requires independent examination by the reviewing court. See *Christopher v. Iowa*, 559 F.2d 1135, 1138 & n.13 (8th Cir. 1977); *Schultz v. American Can Co.*, 424 F.2d 356, 360 & n.6 (8th Cir. 1970); *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 267 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *cf. Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3853 (June 29, 1977). The ultimate statutory issue of job equality does not fall within the purview of Fed. R. Civ. P. 52(a). See generally *Baumgartner v. United States*, 322 U.S. 665, 670-672 (1944).

¶¶ 65-66, 69. The court of appeals disparaged this supervisory responsibility, relying on the following "finding" by the district court:

"The 'supervisory' functions of Senior cabin attendants — whether purser or stewardess — are *less important than*, and require no greater skill, effort or responsibility, than *the other functions assigned to all cabin attendants*." Pet. App. 37c-38c (emphasis added) (footnotes omitted).

Although the court expressly acknowledged the existence of "increased responsibility borne by the more senior personnel," it concluded that the supervisory duties of pursers are not *significant enough* to warrant the pay differential between pursers and stewardesses (Pet. App. 39c). But, in light of the undeniable material difference between the specific functions and responsibilities of pursers and stewardesses (366 F. Supp. at 783-785, 786-787, Pet. App. 43a-48a, 51a-52a, ¶¶ 61-66, 71; Pet. App. 9c-16c), the courts below were not free to conclude that the jobs nevertheless were "equal" for purposes of the Equal Pay Act.

If some skills, labors, or responsibilities are different, it is of no consequence that the differences are, in the view of a court, "less important" than the similarities. It is not the function of the courts under the Act to engage in *de novo* reevaluation of the total skill, effort, and responsibility of distinct jobs to reach a judicially contrived common denominator. For jobs — or their components — to fall outside the "equal work" standard they need not necessarily be more or less "important" than each other. They need only be different. As the Third Circuit recently explained:

"We find nothing in the case law or in the legislative history to support the proposition that the requirements of equal skill, effort, responsibility, and similar working conditions can be aggregated to establish job equality, so that, for example, differences in responsibility between two jobs can be offset by compensatory differences in the skill required so as to make the two jobs equal." *Angelo v. Bacharach Instrument Co.*, *supra*, 555 F.2d at 1175-76.

Yet, that is precisely what the courts below did, and their approach is in square conflict with the principles followed by the Third Circuit in *Bacharach*. It was simply not legally material to conclude, as the courts below did, that the work performed by pursers and stewardesses was "essentially equal when considered as a whole" (Pet. App. 10c) and that separate tasks entailed "different, but comparable, duties" (Pet. App. 12c).

The critical point missed by the courts below is that pursers are, by definition, supervisors, and as such exercise the responsibility for supervising all flight attendants, including stewardesses, who never supervise pursers. As the Fifth Circuit put it:

"Congress intended to permit employers wide discretion in evaluating work for pay purposes. . . . [A] wage differential can be justified for employees who are available to perform an important differentiating task even though they do not spend large amounts of time at the task." *Hodgson v. Golden Isles Convalescent Homes, Inc.*, *supra*, 468 F.2d at 1258.

It is impossible to find under the Equal Pay Act that a person who holds a job that can be supervised by any person in another job has "responsibility" that is

"equal" to that latter person's. For example, both a first lieutenant and a master sergeant may share many common functions, but the authority of one to supervise the other surely precludes a finding that they exercise "equal responsibility." See *Cayce v. Adams*, *supra*, \_\_\_\_ F. Supp. \_\_\_\_, \_\_\_\_, slip op. at 2 ("full comparability was not achieved" until the female's supervisor resigned and the female assumed the supervisor's work). This crucial distinction separates pursers from stewardesses.<sup>13</sup>

The court's free-wheeling comparison of the jobs resulted in imposing on Northwest the fundamental

<sup>13</sup>The supervisory duties of a stewardess who happens to be senior on a particular flight not carrying a purser are not the same as those of pursers. The differences are explained in Northwest's cabin service manual. See Pet. App. 14c-15c.

Without citation of authority, the court of appeals held that Northwest could not pay pursers as a class more than stewardesses on the basis of their class-wide characteristic of supervisory responsibility because some pursers were assigned to flights on which they would be subject to supervision by more senior pursers and would not exercise supervisory authority over any stewardesses, while on a non-purser flight the senior stewardess would assume control. The court relied on the fact that Northwest possesses the technological capability to compensate cabin attendants for those specific occasions when they act as supervisors. (Pet. App. 34c-36c.)

Nothing in the language or legislative history of the Equal Pay Act remotely suggests that Congress intended that an employer may not pay one class of employees more than another unless the distinguishing attribute is always common to all members of the higher paid class or unless the employer could not set up a payroll system that constantly adjusted for the incremental changes in activities of individual employees. Cf. *Usery v. Richman*, 558 F.2d 1318, 1321 (8th Cir. 1977), where the court upheld a wage differential in a much simpler setting even though "the women were able to substitute for [the male employee] in terms of his individual assignments. . . ."

injustice and economic irrationality of an order to pay retroactively to some 2,000 stewardesses (whether or not they ever bore any supervisory responsibility) the higher wages paid to approximately 100 pursers who had actual supervisory authority.<sup>14</sup> If the court's mode of analysis were to be followed, it would broaden the Equal Pay Act far beyond what was intended and inevitably place the courts in the role of comparing the "total" combined skill, effort, and responsibility required by different jobs, rather than the limited role of determining whether each of the elements of a job is equal, including the element of responsibility.

### III

Backpay under the Fair Labor Standards Act, of which the Equal Pay Act is part, ordinarily may be recovered for only the two years preceding the date suit is filed. Congress provided, however, that in the case of a "willful" violation backpay may be recovered for *three* preceding years. 29 U.S.C. § 255(a).

The district court found that Northwest's management had believed in good faith that pursers and stewardesses held distinct positions having different

<sup>14</sup>Cf. *Cayce v. Adams*, *supra*, \_\_\_\_ F. Supp. \_\_\_\_, \_\_\_\_, slip op. at 5 n.3: "Legal arguments aside, it simply cannot be maintained that Congress intended to remedy every sex-based Civil Service misclassification by upgrading all those with the lower grade even when, as here, the classification standards indicate that the lower grade is the correct one. Such a practice would result in widespread grade inflation and thus threaten the integrity of the entire Civil Service system."

responsibilities and that there were "reasonable grounds" for the company's belief that the pay differential did not violate the Equal Pay Act. 374 F. Supp. at 1390, Pet. App. 1b-2b. The court of appeals did not disturb these findings, but nonetheless upheld the district court's conclusion that Northwest's decision to establish different pay scales constituted a "willful" violation. An employer's action may be deemed "willful," the court below held, whenever he is cognizant of the Equal Pay Act and "consciously and voluntarily charts a course which turns out to be wrong" (Pet. App. 59c). Under this standard not even negligence in the interpretation of the Act is necessary to expose an employer to the added sanctions reserved for a "willful" violation. Whether Congress intended this result is a question of overwhelming importance to all employers and employees governed by the Fair Labor Standards Act and one that this Court must resolve if the accepted distinction between "willful" violations and lesser infractions is to be preserved.

The two-year limitations period was enacted in 1947 when Congress expressed concern about "wholly unexpected liabilities, immense in amount and retroactive in operation." See 29 U.S.C. § 251(a). In 1966 Congress rejected a recommendation from the Secretary of Labor to extend the limitations period for all violations and instead adopted the present language which "maintains [the] 2-year statute of limitations" with an exception "in the case of a willful violation." H.R. Rep. No. 1366, 89th Cong., 2d Sess. 14 (1966). See also S. Rep. No. 1487, 89th Cong., 2d Sess. 36 (1966). The language and history of the Act thus belie

any notion that a finding of willfulness should follow routinely from a violation itself.

Moreover, in the Fair Labor Standards Act, as in other regulatory statutes, Congress attached special civil sanctions, as well as criminal sanctions, to "willful" violations. It is unthinkable that Congress intended to expose every employer whose judgment "turns out to be wrong" to criminal conviction, fine, and imprisonment. The court below concluded that the "willfulness" element could take on two quite different meanings even in the same statute, depending upon the penalty involved (Pet. App. 58c n.230). But that effort to divorce the interpretation of related provisions must be rejected where, as here, there is no evidence that Congress intended divergent standards and the sanctions form a pattern: civil liability for all violations, supplemented by both criminal sanctions and expanded civil liability for violations accompanied by *scienter*. In an analogous case, *United States v. Bishop*, 412 U.S. 346, 359-60 (1973), this Court rejected the kind of approach taken below and held that even though criminal penalties may vary in severity, the word "willful" describes a "constant rather than a variable" standard of conduct.

The very concept of "willfulness" necessarily requires proof of *scienter* beyond that sufficient for a non-willful violation carrying lesser consequences. This Court consistently has interpreted the term "willful," in a variety of regulatory statutes, to mean the "intentional violation of a known legal duty."<sup>15</sup> The

<sup>15</sup>E.g., *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (emphasis added); *United States v. Bishop*, *supra*, 412 U.S. at 360.

requirement of intentional, knowing conduct cannot be satisfied by proof of negligence alone, for as this Court has pointed out, even "unreasonable, capricious, or careless disregard" will not suffice. *United States v. Bishop, supra*, 412 U.S. at 354, 360-61. It follows *a fortiori* that reasonable, good faith conduct that is merely "conscious and voluntary" is not enough.

For the court below, however, it was enough that the pay differential established by Northwest was "deliberate" (Pet. App. 61c). It is virtually impossible to imagine an employment practice that is not "deliberate," particularly one which, as in the present case, is the product of long-standing collective bargaining agreements. Ironically, under the decision below the employer who is most likely to be deemed in "willful" breach of the Act is the one whose belief in the lawfulness of his conduct is the most justifiable — that is, one whose belief has been ratified in the formal collective bargaining process by an adversary bound by law to represent all employees fairly. Congress has evinced a "pervasive intent" to use the requirement of "willfulness" to separate egregious violations involving *scienter* from a larger class of "well-meaning" transgressions. See *United States v. Bishop, supra*, 412 U.S. at 361. The decision below effectively lumps all violations together and prescribes the most severe penalty for all — an anomaly that Congress could never have intended.

As the court below expressly acknowledged (Pet. App. 51c), at least "two divergent views" have evolved among the circuits in "wrestling" with the interpretation of the "willful" element in this Act. By adopting a new test (Pet. App. 58c-59c), the court of appeals has compounded the confusion on this important issue. The

time is certainly ripe for this Court to resolve the conflict.<sup>16</sup>

#### IV

An Equal Pay Act claimant, like others suing under the Fair Labor Standards Act, may recover not only backpay but "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The statute further provides, however, that the district court in its discretion may refuse to award double damages if the employer acted "in good faith" and if he had "reasonable grounds" for believing that his actions were lawful. 29 U.S.C. § 260.

The district court here ruled that double damages should not be imposed, articulating five factors that supported its finding that Northwest had reasonable grounds for its belief that the pay differential was lawful:

"the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present legal controversy, and the absence of any clear legal precedent or

<sup>16</sup>The size of the judgment in this case belies the statement by the court below that the answer to this question makes only a "relatively small difference" (Pet. App. 56c-57c). Liability is increased by up to 50% and, as in this case, millions of dollars may turn on whether an employer has acted "willfully."

guideline precisely in point." 374 F. Supp. at 1390, Pet. App. 1b-2<sup>1</sup>.

The court of appeals held that four of these five factors were irrelevant to the determination of reasonable, good faith belief (Pet. App. 66c-67c). It ruled that only "legal uncertainty" can afford a basis for relief from the double damages provision, and then only if the uncertainty "pervade[s] and markedly influence[s] the employer's belief" (Pet. App. 68c).

The four factors that the court below discarded are derived from the statute itself. In 1947 Congress gave statutory relief for "good faith" acts to remove the harshness of a liquidated damages provision that previously had been construed as mandatory. Congress found that without the amendment the Fair Labor Standards Act would result in "wholly unexpected liabilities, immense in amount and retroactive in operation" by unexpectedly overriding "long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a) (Congressional findings and declaration of policy). The amendments, including the "good faith" provision of § 260, were intended to avoid this result and to "protect the right of collective bargaining." 29 U.S.C. § 251(a)(6). Yet the decision below holds that (i) tradition and custom, (ii) industry practice, (iii) the collective bargaining agreement, and (iv) Northwest's experience under it – the very circumstances that Congress declared give presumptive legitimacy to employment practices – are irrelevant in applying the "good faith" provision of § 260.<sup>17</sup>

<sup>17</sup> The court below cited no authority for this unprecedented rejection of statutory criteria, and the only reason it gave was that "sex discrimination litigation against the airline industry"

(continued)

By insisting that a "legal uncertainty"/that "pervades" the employer's belief is the sole criterion, the decision below effectively makes it impossible for employers to avoid double damages, however reasonable their beliefs. Even when, as in this case, there is an "absence of any clear legal precedent or guideline precisely in point" (Pet. App. 63c), the employer's decision to continue the practice in question will be based on a combination of related factors – tradition, industry practice, and collective bargaining experience, *together with* the absence of legal authority addressing the practice in question – rather than on any one criterion alone. If an established employment practice has not been challenged either by individual employees or by their collective bargaining representative, the employer has little reason to suppose that there is any legal infirmity.<sup>18</sup>

An employer whose decision was reasonably based on several factors may well have difficulty proving years

(footnote continued from preceding page)

made it appropriate to discard the district court's criteria (Pet. App. 66c-67c). The litigation on which the court focused, however, was commenced *after* the occurrence of the employment practices at issue in this litigation. Moreover, not one of the cases involved the job classifications and pay differentials challenged here.

<sup>18</sup> Other courts have held that if the employer's belief is otherwise reasonable, he is not deprived of the "good faith" protection merely because by making additional inquiry he might have been led to question his judgment that a practice was lawful. See, e.g., *Crago v. Rockwell Manufacturing Co.*, 301 F. Supp. 743, 748 (W.D. Pa. 1969) (employer acted in good faith even though an opinion from internal legal department or from Labor Department might have been sought); *Ispass v. Pyramid Motor Freight Corp.*, 78 F. Supp. 475, 480 (S.D.N.Y. 1948) (employer acted in good faith even though it had not taken affirmative steps to ascertain whether employees were exempt from coverage under Act).

afterward that only a single factor, legal uncertainty, "pervade[d] and markedly influence[d]" his belief. In making pervasive "legal uncertainty" the exclusive touchstone of the "good faith" defense, the decision by the court below reads all other pertinent factors out of the statute and subjects employers to double damages for judgments that were reasonable when made, but are later overturned in litigation — precisely the result Congress sought to prevent.

## V

While this action was pending before the district court, the remedial provisions of Title VII were amended to provide that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Opportunity] Commission." 42 U.S.C. § 2000e-5(g). In holding that the two-year limitation did not apply to this case (Pet. App. 71c-72c), the court of appeals ignored the settled principle "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."<sup>19</sup> The court's holding also conflicts with this Court's decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and with the recently decided case,

<sup>19</sup>*Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974); see *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281 (1969); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

*Roberts v. Western Airlines*, 425 F. Supp. 416, 419-25 (N.D. Cal. 1976).

A successful Title VII claimant is not entitled to backpay as of right; backpay is only one of the discretionary, equitable remedies that courts may grant under Section 706(g). See *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 415-16. Thus, application of the 1972 amendment to respondents' claim could not have deprived them of a vested right. It is settled law that changes in remedies are normally and properly applicable to pending disputes. It is not surprising, therefore, that this Court assumed in *Albemarle* that the backpay limitation applied there, even though that case, like this one, was pending in court when the amendment became effective. See 422 U.S. at 410 n.3.<sup>20</sup>

In concluding that the 1972 amendment does not apply to this case, the court of appeals relied on

<sup>20</sup>The district court, although concluding that the amendment was not strictly applicable to this case, limited the recovery period to two years in the exercise of its discretion, taking into account the "considerations" expressed by Congress. 374 F. Supp. at 1390, Pet. App. 2b-3b. Purporting to rely on *Albemarle*, the court of appeals reversed, asserting that the district court's approach was inconsistent with the "make whole" remedy provided by Title VII (Pet. App. 76c-80c). *Albemarle*, however, discusses the "make whole" remedy in the context of the 1972 amendments. See 422 U.S. at 415-16 & n.9, 419-20 & n.13. Thus, this Court evidently considered the statutory two-year limitation on back pay to be consistent with the "make whole" remedy, as Congress designed it.

Even if the 1972 amendment did not apply of its own force, the court of appeals certainly overreached in prohibiting the district court, in exercising its equitable discretion to define the appropriate backpay period, from applying the policy judgment the amendment reflected.

Section 14 of the 1972 legislation, which provides that the amendments to Section 706 of Title VII "shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." Pub. L. No. 92-261, 86 Stat. 103. Without any reference to the legislative history, the court concluded that the "irresistable inference from this language is that the amendments were not to extend to litigation which on their effective date had proceeded beyond the Commission stage" (Pet. App. 71c).<sup>21</sup>

Far from "irresistable," however, the inference drawn by the court defies common sense and disregards the history of Section 14. If Congress had been trying to draw lines restricting the application of the new limitations period, it would have chosen the date the unfair employment practice occurred, not the status of the claim in the administrative/judicial process.

The legislative history confirms that Section 14 was designed to deal with a *different* issue. Section 14 was enacted simply to make explicit that the EEOC's new judicial enforcement power would be effective *immediately* and would apply to the large backlog of cases then pending before the Commission.<sup>22</sup> Since Congress

<sup>21</sup>Other appellate decisions holding that the two-year limitation on backpay does not apply to actions pending in court are also devoid of substantive analysis. See, e.g., *EEOC v. Steamfitters Local 638*, 542 F.2d 579, 590 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977).

<sup>22</sup>The 1972 amendments to Title VII, as initially reported out of committee in both Houses, would have granted the EEOC cease-and-desist power. This was the primary purpose of the amendments to Section 706, and the focal point of debate. The

(continued)

was dealing solely with the retroactivity of the EEOC's new enforcement power, about which doubts had been raised, it is understandable why Section 14 refers to cases pending before the EEOC and makes no reference to cases that were already in court in private litigation — like the present case. There is no reference in the legislative history of Section 14 to the other amendments to Section 706, including the backpay limitation provision.

In this setting the court below had no basis to conclude that the peculiar language of Section 14, drafted to assure immediate effectiveness of one part of the amendments to Section 706, was intended to *preclude* the immediate application of the backpay limitation. This Court has firmly established the principle that "a change in the law must be given effect *unless* there was clear indication that it was *not* to apply in pending cases." *Bradley v. School Board of Richmond*, *supra*, 416 U.S. at 712-13 (emphasis in the original). The contrary result reached by the court

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respective bills provided that the new cease-and-desist power would be prospective only and, thus, would not apply to charges filed with the EEOC prior to the effective date of the amendments. See H.R. Rep. No. 238, 92d Cong., 1st Sess. 9-10 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 20 (1971). In both the House and the Senate, however, the cease-and-desist power was supplanted with the power of the EEOC to institute enforcement actions in the district courts. The new House bill was silent as to retroactivity; the provision that eventually became Section 14 was added to the Senate bill by an amendment offered by Senator Javits. As he explained, the amendment had been suggested by the Department of Justice, which *avored* "retroactive" application of the authority to sue, so as to cover charges already at the EEOC. See 118 Cong. Rec. 4816 (1972).

below thus departs from settled principles and authorizes the imposition of substantial, additional liability of the type that Congress specifically sought to avoid.

## VI

Title VII permits actions to be brought only by persons who have filed a charge with the EEOC within a limited period after the challenged employment practice occurred. At the time this suit was filed that period was 90 days. Section 706(d), Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 259, *codified in* 42 U.S.C. § 2000e-5(d) (1970).<sup>23</sup> While a person who has met this filing requirement can sue on behalf of all persons subject to the alleged discriminatory practice, *see Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 414 n.8, the class can extend only to those who were in a position to seek relief from the EEOC at the time the class representative filed with the EEOC. As the court below recognized: "That filing . . . cannot revive claims which are no longer viable at the time of the filing" (Pet. App. 82c) (footnote omitted). Nevertheless, the court of appeals held that Northwest was "estopped" from arguing that the Title VII class could not include stewardesses whose employment had terminated more than 90 days before the filing of charges with the EEOC, because the phrasing of the Title VII notice to potential class members may have

<sup>23</sup>The 1972 amendments to Title VII extended this period to 180 days, but this change is not material to the legal question at issue. *See* 42 U.S.C. § 2000e-5(e) (Supp. II, 1972).

misled them into ignoring the Equal Pay Act notices they were also sent.<sup>24</sup> The applicability of "estoppel" concepts to Title VII's timeliness requirements presents an important issue, and its resolution below is squarely at odds with controlling decisions of this Court.

This Court has stated on a number of occasions that the EEOC filing requirement is a "jurisdictional prerequisite" to assertion of a civil claim in court.<sup>25</sup>

<sup>24</sup>The extraordinary lengths to which the court of appeals was willing to go to impose liability on Northwest is demonstrated by the unsupportable basis for its estoppel holding. Estoppel is an equitable doctrine that precludes a party from taking advantage of an act or omission that he has wrongfully induced by his own affirmative conduct. *See generally Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-34 (1959). According to the court of appeals, Northwest was estopped because it purportedly had not timely raised the 90-day bar and thus was responsible for the misleading class notices sent to stewardesses (Pet. App. 84c-85c, 89c-90c). The crucial fact — the fact that precludes a finding of estoppel here even if the filing requirement is not a jurisdictional bar — is that *counsel for the plaintiff stewardesses* drafted the proposed notices that formed the basis for the notices adopted by the district court (J.A. 61-62).

Furthermore, the legal status of those "class" notices to solicit Equal Pay Act plaintiffs is highly questionable since virtually every other circuit has ruled that a Rule 23 class action cannot be maintained under any portion of the Fair Labor Standards Act (of which the Equal Pay Act is part). *See, e.g., Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975) (and cases cited); *Doctor v. Seaboard Coast Line Railroad*, 540 F.2d 699, 710 n.37 (4th Cir. 1976) (*dictum*). And there are "no procedures for the court to direct notice to the [EPA] class." *Maguire v. Trans World Airlines, Inc., supra*, 55 F.R.D. at 49.

<sup>25</sup>*See United Airlines, Inc. v. Evans, supra*, 97 S. Ct. at 1887 n.4; *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 239-40 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 798.

Because it is jurisdictional, it cannot be waived by the parties, whether by agreement or through independent action that otherwise might constitute grounds for estoppel.<sup>26</sup> By reaching the question of estoppel, both courts below violated this fundamental principle of federal jurisdiction.

Choosing to ignore the repeated and unequivocal characterization of the filing requirement as jurisdictional, the court of appeals analogized it to a statute of limitations and held that it is subject to "equitable modification" (Pet. App. 86c-89c). The court relied on decisions of other courts of appeals that had held that the time provision is tolled by resort to a contractual grievance procedure (Pet. App. 87c & n.343). Subsequently, however, those decisions were decisively rejected by this Court last Term in *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, *supra*. In that case the Court squarely rejected an employee's argument that the 90-day filing requirement should be subject to "equitable tolling." The Court reasoned: "In defining Title VII's jurisdictional prerequisites 'with precision,' . . . Congress did not leave to courts the decision as to which delays might or might not be 'slight' " and, hence, which might or might not be "acceptable." 429 U.S. at 240 (citation omitted). Thus, even if this Court were not to grant plenary review on other issues presented, the decision below should be summarily reversed on this issue.<sup>27</sup>

<sup>26</sup>See, e.g., *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951); *Ahrens v. Clark*, 335 U.S. 188, 193 (1948); *United States v. Griffin*, 303 U.S. 226, 229 (1938).

<sup>27</sup>A related issue was before the Court earlier this Term in *Shell Oil Co. v. Dartt*, No. 76-678 (Nov. 29, 1977), *aff'g by equally divided Court* 539 F.2d 1256 (10th Cir. 1976).

## CONCLUSION

This petition for a writ of certiorari should be granted and the case set for argument. Alternatively, in light of the facts that the decision below was rendered on October 20, 1976, and that this Court has decided a number of highly relevant cases<sup>28</sup> between that date and the court of appeals' denial of rehearing without opinion on September 8, 1977, the Court might wish to vacate the judgment below and remand the case for full reconsideration in light of the intervening decisions.<sup>29</sup>

<sup>28</sup>As discussed above, these cases include *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Trans World Airlines, Inc. v. Hardison*, 97 S. Ct. 2264 (1977); *International Brotherhood of Teamsters v. United States*, 97 S. Ct. 1843 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Hazelwood School District v. United States*, 97 S. Ct. 2736 (1977); *United Airlines, Inc. v. Evans*, 97 S. Ct. 1885 (1977); *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

In addition, there are three cases argued this Term whose disposition may bear upon the issues raised in Questions 1 and 6 of this Petition. See *Nashville Gas Co. v. Satty*, No. 75-536, argued Oct. 5, 1977; *United Air Lines, Inc. v. McMann*, No. 76-906, argued Oct. 4, 1977; *Richmond Unified School District v. Berg*, No. 75-1069, argued Oct. 5, 1977. See also *Shell Oil Co. v. Dartt*, No. 76-678 (Nov. 29, 1977), *aff'g by equally divided Court* 539 F.2d 1256 (10th Cir. 1976).

<sup>29</sup>Compare *Massachusetts v. Feeney*, 46 U.S.L.W. 3237 (October 11, 1977), vacating and remanding for further consideration in light of *Washington v. Davis*, 426 U.S. 229 (1976). Although the court of appeals in denying rehearing in this case asserted that it was cognizant of intervening decisions of this Court (Pet. App. 1f-2f), proper consideration of the seven decisions could only be based on full briefing in light of the record and an analytical discussion by the court of appeals of their impact.

Respectfully submitted.

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December 1977

## STATUTORY APPENDIX

*Equal Pay Act of 1963 -*

29 U.S.C. § 206(d) (1970), as added to the Fair Labor Standards Act by Pub. L. No. 88-38, § 3, 77 Stat. 56:

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

\* \* \* \*

(3) For purposes of administration and enforcement, any amounts owing to an employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

\* \* \* \*

*Fair Labor Standards Act —*

Section 16(b), 29 U.S.C. § 216(b) (1970):

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. \* \* \*

29 U.S.C. § 251(a) (1970), as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub. L. No. 80-49, § 1, 61 Stat. 84:

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were

permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and

(10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

\* \* \* \*

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

\* \* \* \*

29 U.S.C. § 255(a) (1970), as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub. L. No. 80-49, § 6, 61 Stat. 87, as amended by Pub. L. No. 89-601, § 601(b), 80 Stat. 844 (1966):

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

\* \* \* \*

29 U.S.C. § 260 (1970), as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub. L. No. 80-49, § 11, 61 Stat. 89:

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

#### *Title VII of the Civil Rights Act of 1964 —*

Section 703, 42 U.S.C. § 2000e-2 (1970):

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

\* \* \* \*

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

\* \* \* \*

Section 706(d), 42 U.S.C. § 2000e-5(d) (1970):

(d) A charge under subsection (a) shall be filed *within ninety days* after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or

local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.\*

Section 706(g), 42 U.S.C. § 2000e-5(g) (Supp. II, 1972):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was

\*The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104, amended the italicized language to permit charges to be filed within 180 days instead of 90 days. The provision is now codified at 42 U.S.C. § 2000e-5(e) (Supp. II, 1972).

refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.\*

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\*The italicized language was added by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104.

FILED

No. **77-802**

DEC 5 1977

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1977

**NORTHWEST AIRLINES, INC.,**

*Petitioner,*

v.

**MARY P. LAFFEY, et al.,**

*Respondents.*

**APPENDIX TO THE  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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APPENDIX A

**United States District Court**  
FOR THE DISTRICT OF COLUMBIA

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Civ. A. No. 2111-70

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MARY P. LAFFEY et al.,

*Plaintiffs,*

v.

NORTHWEST AIRLINES, INC.,

*Defendant.*

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The above-entitled matter came on for trial before the undersigned Judge of the above Court commencing on December 4, 1972, and continuing thereafter until January 10, 1973.

Michael H. Gottesman, Esquire and Dennis D. Clark, Esquire of Bredhoff, Barr, Gottesman, Cohen & Peer appeared for the Plaintiffs. Gilbert Feldman, Esquire of Kleiman, Cornfield and Feldman, counsel for Air Line Stewards and Stewardesses Association, International, Transport

Workers Union of America, AFL-CIO, appeared for a portion of the trial on behalf of the Plaintiffs. Henry Halladay, Esquire and David A. Ranheim, Esquire of Dorsey, Marquart, Windhorst, West & Halladay, appeared for the Defendant, Donald J. Capuano, Esquire of O'Donoghue & O'Donoghue appeared for Air Line Pilots Association, International on the first day of trial, and on one other occasion at the close of trial to indicate a potential desire to present evidence; no further appearance was made and no evidence was presented by Air Line Pilots Association, International. Karl W. Heckman, Esquire of the United States Department of Labor appeared for portions of the trial; no evidence was presented by the Department of Labor.

Based upon the oral testimony at trial, the designated deposition testimony submitted to the Court, exhibits introduced by both parties, and all of the files, records and proceedings herein, the Court duly advised in the premises, in accordance with Rule 52 of the Federal Rules of Civil Procedure, makes and enters its Findings of Fact, Conclusions of Law and Order for Judgment as follows:

### *FINDINGS OF FACT*

1. The named Plaintiffs are [or were] female cabin attendant employees of Northwest Airlines, Inc. [hereinafter "NWA" or "the Company"], and this action has been certified as a class action on behalf of all NWA female cabin attendants employed at any time from July 2, 1965 to the present.

2. The Defendant, NWA, is an air carrier which was formed in 1926, and it currently maintains its corporate headquarters and main base at the Minneapolis-St. Paul International Airport in Minnesota.

3. NWA first began passenger service between Minneapolis-St. Paul and Chicago, and from 1927 to 1946, extended its routes to other cities in the continental United States. Virtually all of NWA's flights cross state lines, and it is engaged in interstate commerce. In 1947 NWA began scheduled service to the Orient, and since that date has increased the number of its routes within and without the continental limits of the United States. NWA has used various types of equipment to fly these routes over the years, including (1) propeller driven equipment [DC-4, Strato-cruiser, DC-6, DC-7] accommodating between approximately 25 and 100 passengers with a cabin crew complement of two or three, (2) jet equipment [DC-8, 727, 720B, 707-320] accommodating between approximately 100 and 150 passengers with a cabin crew complement of five, and (3) the new wide-bodied jet equipment, including the 747 and the DC-10, carrying as many as 362 passengers with a cabin crew complement of as many as sixteen.

4. NWA's international operations are extremely competitive, much more so than its domestic operations. There is no significant market in NWA's international system that is not competitive with at least two or more international carriers. Most of these carriers are significantly larger than NWA and also have the competitive advantage of operating around the world, thus being able to carry through-traffic beyond the New York and Hong Kong termination points of NWA's system.

5. In a normal year not subject to the impact of a strike, NWA handles approximately seven million passengers producing gross revenues of approximately \$450 million. This ranks NWA approximately seventh among the eleven trunk

carriers in the United States. From 1968 through 1970, NWA lead all United States air carriers in annual net profits, earning between 44.5 and 51.5 million dollars per year. In 1971, NWA was second in net profits with nearly 21.5 million dollars, the drop being attributed to the effects of a labor strike in the latter part of 1970.

6. All cabin attendants employed by NWA between 1927 and 1947 were females classified as stewardesses. The company has continued to employ females in the stewardess classification up to and including the present time. In 1947, the Company established a cabin attendant classification purser. From 1947 through June 15, 1967, the Company followed an express policy of confining the purser job solely to males. In 1949, the Company established a cabin attendant classification of flight service attendant (FSA), which has always been filled exclusively by males. The FSA classification was established when the Company began utilizing a plane called the Boeing Stratocruiser, which had a sunken bar lounge. The Company decided that a male cabin attendant should be assigned to the bartending function (as well as other cabin attendant duties) on this plane. Except for the cocktail service on this plane, FSAs were hired to perform the same duties that female stewardesses performed.

7. On December 17, 1946, the National Mediation Board certified Air Line Stewards and Stewardesses Association, International (hereinafter "ALSSA") as the duly designated collective bargaining representative of NWA's female cabin attendants. This certification subsequently was amended on October 22, 1948, to provide that ALSSA also was the duly designated representative of NWA's pursers, and again on June 20, 1950, to provide the same represen-

tative for NWA's male cabin attendants. On July 7, 1961, ALSSA having affiliated with the Transport Workers Union of America, AFL-CIO, the National Mediation Board certified "Air Line Stewards and Stewardesses Association, International, Transport Workers Union of America, AFL-CIO" as the duly designated representative of all cabin attendant and purser employees of NWA. In 1971 NWA's cabin attendants and pursers voted to replace ALSSA with Air Line Pilots Association, International (hereinafter "ALPA") as their representative, and the National Mediation Board so certified on September 17, 1971. ALPA has joined this action as a "non-aligned party."

8. At all times the membership of NWA's cabin attendant class or craft (including pursers) represented by ALSSA or ALPA has been predominantly female, so that females always have and still do possess a clear numerical superiority over males in the affairs of the class or craft and the union representative. The members are called upon to vote for their representatives within the internal union structure, to state their views and proposals in connection with collective bargaining, to ratify new agreements, and otherwise to participate in the process by which their rates of pay, rules and working conditions are established.

9. At all times from December 17, 1946 to date, NWA has entered into collective bargaining negotiations and agreements with the certified union representative, ALSSA or ALPA, pursuant to the mandate of and the procedures outlined in the Railway Labor Act, 45 U.S.C. §151 et seq. The agreements have covered all United States-based cabin attendants and pursers, but not those based in the Orient and assigned exclusively to flights within the Orient ["interport"].

10. Since at least 1943, NWA has employed female cabin attendants as "stewardesses." In the first collective bargaining agreement, dated September 19, 1947, a "stewardess" was defined as:

... an employee who is responsible for the performing or assisting in the performance of all enroute cabin service, or ground service, to delayed or canceled passengers, and shall include the responsibility for the welfare, comfort, enjoyment and safety of the passengers, as prescribed by the Company regulations.

A salary was established for that position. The definition has continued to the present, and the salary has increased over time by union negotiation and agreement.

11. In 1947 when NWA obtained and began flying routes to and through the Orient [see Finding 3], the purser classification was established. In the first collective bargaining agreement including pursers, dated January 1, 1949, the position of "flight purser" was defined as follows:

"Flight Purser" means an employee on the international division whose work includes performing and assisting in the performance of all enroute cabin service, attending to passenger comfort, responsibility for the preparation and completion of passenger, crew, and cargo manifests and other reports and documents as may be required by the Company or by law. A flight purser may be designated to perform necessary duties in connection with flight cargo operations, may be designated as being in charge of other cabin attendants, may be required to accept special assignments related to flight purser duties, and from time to time may be requested to participate in publicity and promotional assignments not in violation of any of the terms of this Agreement.

The definition of a "purser" has continued to the present time. A salary was established for the purser position at a rate higher than that for the stewardess position. The salary for the position has increased over time pursuant to union negotiation and agreement.

12. In 1949 NWA began hiring male cabin attendants as "flight service attendants" [FSA's] to fly particularly on the Boeing Stratocruiser aircraft. They were to perform essentially the same duties as female cabin attendants on those and other flights. Effective with the 1951 collective bargaining agreement, FSA's were included in the definition of "Stewardess" appearing in the earlier agreements, which was carried forward thereafter.

13. Beginning with the 1951 collective bargaining agreement and continuing thereafter to date, a combined purser-FSA seniority list was created by virtue of which FSAs began accruing seniority as pursers immediately upon commencing their duties as FSAs.

14. From 1951 until the June 15, 1967 collective bargaining agreement, FSAs had a contractual right to fill purser vacancies in seniority order. From 1951 on, as permanent vacancies in the purser position arose, notices of the purser vacancies were posted, addressed only to male employees. At no time did the Company fail to award a purser vacancy to the most senior FSA bidding for it. The Company's policy was that any FSA who had successfully completed his FSA probationary period was thereby deemed qualified for purser vacancies.

15. As temporary vacancies in purser positions arose, FSAs were temporarily elevated to fill such vacancies and received purser pay for doing so. When they were promoted

to permanent purser positions, they received credit on the purser pay scale for the time spent filling temporary purser vacancies.

16. FSAs who chose to pass up promotional opportunities to purser and then later promoted to purser jumped ahead for all seniority purposes, of junior employees who had been promoted ahead of them.

17. The Company hired its last FSA in 1957 (the discontinued use of the Boeing Stratocruiser having eliminated the Company's interest in having FSAs). Between 1957 and 1964 all purser vacancies were filled by the promotion of FSAs in the manner described above. By mid-1964, the Company had exhausted the supply of FSAs who desired elevation to purser positions. As subsequent purser vacancies arose, the Company invoked its contractual right to transfer "the most junior employee" to force the remaining few FSAs who were based in Minneapolis to transfer to the Seattle base and fill purser vacancies. By May 1965, there remained only three FSAs, all voluntarily based in Honolulu flying on military charter flights for the United States Government, certain of which required the use of male cabin attendants only.

18. As of May 1, 1965, just prior to the effective date of Title VII of the Civil Rights Act of 1964, the Company employed 48 male pursers, no female pursers, three male FSAs, and 724 female stewardesses.

19. The last purser was hired by the Company on April 25, 1970. As of that date, the Company employed 137 male cabin attendants, all as pursers, and 1,747 female cabin attendants, all but one classified as stewardesses. (The single female purser was Mary P. Laffey, who was promoted

from the classification of stewardess effective October 4, 1967.

20. Between May 1, 1965, and May 1, 1970, the Company hired 118 new male cabin attendants, all of them as pursers. During the same period, it hired 2,224 new female cabin attendants, all of them as stewardesses.

21. Recently, NWA has hired several male cabin attendants as "stewards" to perform the same duties as stewardesses and FSA's and at the same union negotiated and agreed upon rate of pay. At all times from 1949 to the present, FSA's and stewards have been compensated at the same rate as stewardesses of equal longevity. The single compensation schedule provided by union contract for the cabin attendant classification establishes periodic increments based upon accumulated longevity in that classification. In addition to the basic compensation, cabin attendants engaged in "foreign flying" [flights to or from foreign countries, Alaska or Hawaii, excluding Winnipeg, Canada] have been compensated either according to a separate schedule at a higher rate or according to a specific hourly supplement. Pursers receive no such supplement.

22. The Company and ALSSA engaged in collective bargaining negotiations in 1963 and 1964, from which eventuated the 1964 collective bargaining agreement. In those negotiations, ALSSA sought a provision which would permit stewardesses to progress to purser vacancies in seniority order after the last FSA who desired to become a purser had done so. The Company refused to agree to this proposal and it was not included in the 1964 agreement.

23. In 1966 and 1967, the Company and ALSSA

engaged in the next round of collective bargaining negotiations eventuating in the agreement which became effective June 15, 1967. One of the Company's opening proposals was that a single "cabin attendant" classification be established, in lieu of the three classifications of purser, FSA and stewardess, and that the rate of pay for this single classification be the rate then paid to stewardesses and FSA's. The Union opposed this proposal, and it was not adopted. One of ALSSA's proposals was that stewardesses be permitted to progress to the position of purser in seniority order, as FSA's had in the past. The Company refused to accept ALSSA's proposal, but stated that it would agree to a provision permitting stewardesses to bid for purser vacancies if the Company was allowed a right of "selectivity." ALSSA acceded to the Company's proposal because it was convinced that it was the most it could achieve. The provision as it appeared in the 1967 agreement provided:

"d. Employees will be notified by posting on the bulletin board of any vacancies occurring within the purser classification. Stewardesses and flight service attendants will be given consideration if they make written application for any such positions. In considering the applications the Company will give consideration, among others, to the employee's past service record, length of service, leadership ability, and test results." P-79, Sec. 9(d)).

This provision replaced the following clause which had appeared in the 1964 agreement, as well as the preceding agreements:

"d. Flight service attendants will be given an opportunity to qualify as a flight purser at any time the Company desires provided that all promotions to the

status of flight purser shall be in the order of their seniority subject to the provisions of this section."

24. The opportunity for stewardesses to seek purser vacancies under the 1967 agreement differed from the manner in which FSAs previously filled such vacancies in the following additional respects:

(a) The 1967 agreement contained a review procedure for stewardesses whose bids for purser vacancies were denied, but that procedure was available only to stewardesses who had "at least four (4) years of service with the Company on flights to which a purser has been assigned." The Company insisted on this limitation to discourage bids for purser vacancies by stewardesses who did not have four years' flying with a purser. A majority of the Company's male pursers became pursers without having flown for four years on flights with a purser.

(b) Whereas the probationary period in the 1964 agreement and in the agreements prior thereto had been "the first four (4) months of service as a flight purser," the provision was changed in the 1967 agreement, at the Company's insistence, to "the first six (6) months of service as a flight purser."

(c) The 1967 agreement left intact the combined FSA-purser seniority list. The effect of this was that stewardesses becoming pursers would go to the bottom of the purser seniority list, whereas both before and after 1967 FSAs who became pursers received credit for their years of FSA service on the purser seniority list. Seniority on the purser seniority list determines the order of bidding for schedules, vacation preference, the order in which

purser are laid off and recalled during reductions in force and restorations in force, and priority in obtaining voluntary transfers to other bases. Additionally, those at the bottom of the purser seniority list are subject to involuntary transfers from one base to another. The most junior employees on the purser seniority list usually wind up with "reserve" schedules. Reserve schedules are generally considered the least desirable, as the employee has no choice of itinerary and must remain available at his telephone for most of the month to be summoned on short notice.

(d) Although FSAs who had completed their probationary period were deemed qualified for purser vacancies under the pre-1967 agreements, no similar policy was applied with respect to stewardesses bidding under the 1967 agreement.

(e) Following the signing of the 1967 agreement, the Company decided to "upgrade" its standards for selecting pursers, and to place greater emphasis on the qualities of supervisory capacity and leadership ability than it had in the past. As part of this greater emphasis on supervisory capacity, the Company decided to begin utilizing tests which had not previously been utilized in the selection of pursers. None of the tests administered to applicants for any cabin attendant positions prior to 1967 had been utilized by the Company to measure supervisory potential or supervisory capacity. When FSAs progressed to purser prior to 1967, they took no tests as a prerequisite to becoming a purser; following the signing of the 1967 agreement, however, stewardesses seeking purser positions were subjected to tests.

25. Stewardesses have been deterred from bidding for purser vacancies since 1967 because:

(a) Under the terms of the agreement they would go to the bottom of the purser seniority list, have last choice in selecting schedules, have to fly reserve, have last choice in selecting vacation time, be the first laid off in a reduction in force, and be subject to involuntary transfers to other bases.

(b) If they are senior, under the terms of the agreement they would not receive any greater pay for a substantial period of time than they would receive by remaining a stewardess.

26. Following the signing of the 1967 agreement, the NWA personnel office was instructed to consider stewardesses for purser vacancies. It was not told to consider female applicants other than stewardesses and it never did. Despite a lack of well qualified applicants for the purser position, the Company did not canvass the stewardess ranks, nor consider applications from females who were applying for stewardess positions. Rather, the Company resorted to advertising and lowering of standards to recruit pursers from outside.

27. When the Company anticipated purser vacancies, its practice was to hire men off the street, put them through its five-week cabin attendant training program, and *then* post notices of purser vacancies. These men were "assured of a job." If the Company awarded a purser vacancy to a stewardess who bid for it, the result would be that the Company had a purser excess, and as future needs arose, no vacancies would have to be posted.

28. Late in the Summer of 1967, without posting notices of the existence of any purser vacancies, the Company hired five male applicants as pursers and entered them

into its training program. These males were hired to fill purser vacancies in October 1967. Laffey learned of the hiring of the men and complained to Homer Kinney, the Company's Director of Labor Relations, that the hiring of these men without posting notices of the purser vacancies violated the 1967 agreement. Kinney acknowledged that Laffey was correct, and a notice was posted on October 20 advising that five purser vacancies at the Seattle base were available for bid, to be filled on or about November 10, 1967. Meanwhile, the five males had completed their training and were assigned to purser positions on October 4, 1967.

29. Two stewardesses bid for these vacancies; Laffey, who had nine years seniority as a stewardess, and Shirley Linburgh, who had 15 years seniority. Linburgh's bid was received a few hours past the bid deadline, and she was advised that consequently her bid would not be considered, despite the fact that five vacancies were posted and only two cabin attendants bid for such vacancies.

30. Although the vacancy for which Laffey bid was to be filled on approximately November 10, 1967, that date passed without Laffey learning anything in response to her bid. She inquired of R. R. McPherrren, her supervisor. McPherrren wrote to Kinney on November 21, inquiring about the delay in processing Laffey's bid; Kinney responded that the delay was because the Company was obtaining new tests to be administered to purser applicants. While Laffey was waiting, the Company hired two more men as pursers, without giving them the tests which (because not yet developed) were the stated reason for making Laffey wait. (Nor were the five male pursers hired in October, 1967, given these tests).

31. Laffey received no response to her bid until April 1968, despite repeated demands by her that the bid be acted upon. This was an unusually long delay for filling a posted purser vacancy. On or about April 10, 1968, Laffey phoned Kinney to remind him that it was now nearly 5 months since the vacancy had been scheduled to be filled. Not until after this inquiry did the Company begin to seek new tests to be administered to purser applicants. Kinney instructed Virgil Fencel, the Company's Director of Employment, to obtain such a test. Fencel then contacted Doctor Lowell Hellervik, a testing specialist who provided regular consulting services to the Company, and requested a short test which could be used to identify supervisory potential in purser candidates. Shortly thereafter, Hellervik recommended to Fencel that the Company use a test called the "Self-Description Inventory," and submitted the test to Fencel on April 17, 1968. In May, Laffey was finally tested and interviewed. In June, she was notified that her bid for the purser vacancy was granted. She became the first and only female purser in NWA.

32. The Company initially advised Laffey that her seniority date on the purser seniority list would be the date of her actual assignment to the purser job in June, 1968. Laffey protested that this would place her below the male pursers who had been hired in October 1967, without the posting of notices as required by the 1967 agreement, as well as below the male pursers who had been hired in December 1967 while her bid was pending. Finally, the Company assigned her a purser seniority date of October 4, 1967.

33. For pay purposes, the Company placed Laffey on the bottom step of the purser salary scale, and began paying her a smaller salary than she had received as a senior stew-

ardess. Laffey filed a grievance protesting that this violated Section 3(i) of the 1967 agreement, which provided: "No reduction in pay shall be suffered by an employee by virtue of his accepting a purser assignment." The Company ultimately acquiesced and raised Laffey's salary to that which she had been receiving as a stewardess. Thereafter, the Company treated Laffey as moving one step up the purser scale for each six months she served as a purser. It was not until Laffey reached the fifth step of the purser salary scale that she began to receive a higher salary than she had received as a stewardess; until that point, she continued to receive her stewardess salary pursuant to the "no reduction in pay" provision.

34. Because Laffey was not given credit for her years as a stewardess when she was placed on the purser seniority list, she occupied a relatively junior position on that list, and was forced to bid the least desirable schedules, frequently having to fly as a reserve purser.

35. In July, 1970, the Brotherhood of Airline Clerks (BRAC), which represents certain of the ground personnel employed by the Company, struck. The strike lasted until mid-December, 1970. The Company flew only a portion of its flights during the strike. At the conclusion of the strike, the Company decided to remove pursers from certain flights on which it had previously used them. As a result, a number of pursers were demoted to FSAs, and Laffey was demoted to stewardess. As purser vacancies have arisen since December, 1970, they have been filled by the demoted pursers in the order of their purser seniority. Because reductions in force are governed by purser seniority, Laffey was one of those who lacked sufficient seniority to remain as a purser.

From that date until the present, she has been reduced to her former status as a stewardess and has been paid as such, while men hired in 1965 and 1966 have continued to fly as pursers. Had she been assigned a purser seniority date which included her seniority as a stewardess (in the same manner that FSAs who progressed to purser had their seniority as an FSA included in their years of service as a purser), she would have had sufficient seniority to remain as a purser at the time of the reduction in force and at all times thereafter to the present date.

36. Other stewardesses who submitted bids for purser vacancies were refused.

(a) In late 1967, Alice Bernhard, a stewardess with 8½ years of seniority, submitted a timely bid for a purser vacancy to be filled in late December. Bernhard received a letter from McPherran advising that her "qualifications at this time are not sufficient" to be a purser. No tests were administered to Bernhard, nor was she interviewed, prior to the Company's rejection of her bid. She did not file a grievance concerning the denial of the bid.

(b) In October, 1969, stewardess Carolyn A. Blair (now Carolyn Ingold) submitted a timely bid for a purser vacancy. On November 5, 1969, McPherran wrote to Blair that her bid was rejected because her qualifications were insufficient to be a purser. The Company neither interviewed nor tested Blair prior to the sending of this letter. Blair's pre-employment interviews and tests, and her cabin attendant evaluations, reflected that she was mature, unusually intelligent, and a dedicated cabin attendant. She did not file a grievance concerning the denial of the bid.

(c) In April, 1969, Janice P. Smith, a stewardess with five years' seniority, went to the Company's Cabin Service Office in Seattle, filled out an application for employment as a purser, addressed it to the Company's general headquarters in Minneapolis, and left it for delivery in the intra-company mail. She received no response to her application. In late 1969, Smith went to the Seattle office and asked McPherren what was happening with respect to her application. McPherren responded that he was not aware that she had made an application. Smith replied that she had, and asked if she could fill out another application in McPherren's presence, or file a letter of preference. McPherren replied that she could not, and that she would have to wait until a notice of purser vacancy was posted and bid at that time. Smith said that she would rather leave an application, as she had not seen notices in the past, and feared that she would miss them and thus not be able to bid when purser vacancies arose. McPherren told her that those not employed with the Company, or employed in non-cabin-attendant positions, could seek purser positions through such applications but that stewardesses had to wait until a posted vacancy appeared.

(d) On March 21, 1970, stewardess Beverly Emge submitted a timely bid for a purser vacancy at the Washington base. No other bids were submitted for the vacancy, and Emge was invited to Minneapolis (she was based in Washington, D.C.) to be interviewed on April 17, 1970, by James Robertson, the Company's Director of In-Flight Services. Robertson told Emge that if she took the vacancy she would be the junior purser and thus would have no choice in her bidding assignments, that she would

suffer a cut in pay, and that, as the junior purser, she would be subject to being involuntarily transferred to other bases. He told her that the Company was contemplating a reduction in the size of its Washington base, and an expansion of its Honolulu base, so that Emge would run a serious risk of being transferred to Honolulu if she accepted the bid. Emge did not wish to leave the Washington, D. C. area. Based upon Robertson's representations that her acceptance of the purser vacancy might result in her involuntary transfer to Honolulu, she was doubtful whether to take it. Robertson told her that she had to decide immediately, as there was a male cabin attendant at another base who was anxious for the vacancy. Emge said she would withdraw her bid, and Robertson had her sign a letter, which was already prepared and typed, withdrawing her bid.

1. Three days later, the Company posted a notice announcing yet another purser vacancy at the Washington base, to be filled on or about May 2, 1970. Upon seeing this posting, Emge had a change of mind and accordingly, on April 23, 1970, submitted a bid for this new purser vacancy at the Dulles base.

2. The notice had stated that bids had to be submitted no later than noon Pacific Daylight Time on May 1, 1970. By the close of business on April 30, Emge's was the only bid for this vacancy. Early in the morning of May 1, 1970, at or prior to 7 a.m. Honolulu time, Chalmers Hunter, a purser based in Honolulu, phoned In-Flight Supervisor Jack Gulett, who was staying at a Honolulu hotel, and indicated a desire to transfer to Washington, D.C. Gulett advised Hunter that there was a vacancy for which bids had to be sub-

mitted that very day. Hunter said that there was no way he could transmit a bid so that it would be received by the Company in Seattle by the 12 noon deadline (12 noon Seattle time is 9 a.m. Honolulu time). Gulett said that he would try to utilize the Company's teletype equipment for that purpose. Gulett phoned the Company's crew scheduling office in Honolulu and instructed an employee "to get the bid on the machine immediately." The teletype operator types the time of transmission on the message. Gulett told him that the bid "had to be dated before noon Pacific time to be valid." According to the Company's records, the bid was received in Seattle at 11:53 a.m. Pacific Daylight Time. Later that day, the Honolulu office received a reply teletype from Seattle announcing that Hunter was the successful bidder for the vacancy.

3. Emge's seniority date is September 29, 1961. Hunter's seniority date is November 16, 1969. On the ground that she had greater seniority, Emge filed a grievance protesting the award of the purser vacancy to Hunter. The Company, thru Robertson, construed the 1967 and subsequent agreements as according junior pursers priority over senior stewardesses if both bid for the same purser vacancy and accordingly, denied the bid.

37. From the time the purser classification was established in 1947 until June 15, 1967, NWA exclusively hired males for the purser position. The Company desired to confine the purser position to males for the following reasons:

(a) A belief that males could more adequately perform the supervision and conducting job of the purser.

(b) Oriental officials, passengers and cabin attendant were conditioned by custom and mores to deal with and accept leadership and direction of males rather than females.

(c) It was considered important to have male pursers on the transpacific flights to cope with rowdy seaman crews.

(d) Lifting of heavy cargo, food, galleys, baggage could best be performed by males.

(e) During the period from 1963-1970, NWA flew certain military charter flights out of Honolulu on which only males could be used pursuant to United States Government contract and specifications.

(f) An interest in having pursers once trained remain with the Company to avoid need for special purser training and turnover on international routes, the Company experience being that males were more career oriented and more likely to remain with the Company (turnover rate among NWA's female cabin attendants three times greater than male cabin attendants).

38. The Company sought to effect its desire to confine the purser position to males in the following ways:

1) Between May 1, 1965 and May 1, 1970, hiring 119 new pursers, only one of whom was a stewardess (Plaintiff, Laffey) and during same period hiring 2,244 new female cabin attendants. As of April 25, 1970, NWA employed 137 male cabin attendants, all as pursers, and 1,747 female cabin attendants, all but one as stewardesses.

2) Top Company personnel were explicit and candid

in expressing personal and Company preference for male pursers and discouraging stewardesses who applied.

3) Inordinate and unusual delay in processing the bid of Plaintiff, Laffey, the only female applicant to survive an immediate or perfunctory rejection.

4) Disqualification of stewardesses without interview or tests and despite their experience as cabin attendants.

5) Posting notices of pursers vacancies addressed expressly to male employees ("to all purser and FSA's").

6) Failing to consider stewardess applicants for purser positions no matter how well qualified.

7) Hiring and training new pursers in anticipation of purser vacancies, then posting notice of vacancies and thus assuring jobs to new pursers rather than awarding vacancies to possible applicants from the stewardess ranks.

39. Qualifications and requirements for female cabin attendants have differed from male cabin attendants as follows:

1) Female cabin attendants, when hired, sign a form stating: "I understand that among the qualifications and requirements of a stewardesses' position are . . . weight in proportion to height, that failure to maintain such qualifications . . . will be cause for termination of my employment." Male cabin attendants are not required to sign such a form when hired. When hired, female cabin attendants are given a specific weight at which they must report for training; if they arrive at training more than one pound over this prescribed weight, they may be dismissed from class. No such requirement is imposed upon male cabin attendants hired.

2) The Company's Cabin Service Manual contains a table of prescribed weights to which female cabin attendants must adhere. Prior to the trial in this case no such weight chart existed for male cabin attendants. All female cabin attendants are weighed on a regular basis at least two times per year, and are also weighed whenever they appear overweight. No such periodic weighing of male cabin attendants takes place.

3) Female cabin attendants who exceed the weight prescribed in the cabin service manual by more than five pounds are advised that they will be grounded and ultimately terminated, unless they return to their prescribed weight within a specific period of time, if they do not return to their prescribed weight they are grounded (i.e. suspended from employment and not permitted to fly) until they have returned to their prescribed weight. Substantial numbers of female cabin attendants have been grounded for exceeding their prescribed weight, and in some instances even terminated.

4) The Company does not regularly monitor the weight of its male cabin attendants, and they have continued to fly even if substantially overweight, without being ordered to lose weight, without being placed on weight check, and without being threatened with grounding or termination. Only rarely have overweight male cabin attendants been placed on weight check (since the effective date of the Civil Rights Act, only three male cabin attendants have been placed on weight check, and of these, two were placed on weight check after the filing of this lawsuit); and only one male cabin attendant has been grounded, for a period of one week, for failure to

maintain an appropriate weight. In each of these rare instances the male attendants involved were very substantially overweight, and were permitted to continue flying even though they did not reduce their weight anywhere near that suggested (or even gained additional weight).

5) The Company has always required female cabin attendants to share hotel rooms on lay-overs away from their home base.

6) Since at least 1964, male cabin attendants have been provided with single rooms on lay-overs. This has been so, for the most part, even where two or more male cabin attendants have been on the same flight. In April 1971, the Company issued a bulletin purporting to remind male cabin attendants "of a Company policy which has existed for many years that when there are two male cabin attendants on a crew, they will share a room at lay-over points." However, the Company rarely, if ever, enforced such a policy, in that even when two male cabin attendants were on the same flight, they obtained single rooms which the Company paid for without objection to the male cabin attendants. On most interport flights (flights beyond Tokyo) there is one male American purser and one male Asian flight service attendant, but they have not been required at any time to share rooms.

7) The Company maintains a rule forbidding all female cabin attendants from wearing eyeglasses, but does not maintain such a rule with respect to male cabin attendants hired prior to September, 1971.

8) Female cabin attendants are subject to discipline, including possible discharge, for violating the Company's rule forbidding them to wear eyeglasses.

9) Female cabin attendants are permitted only to wear contact lenses, which are substantially more expensive than eyeglasses with lenses of comparable quality.

10) At all times, female cabin attendants wishing to carry luggage aboard the plane have been required to purchase luggage strictly prescribed as to brand, size and color.

11) At no time have male cabin attendants been restricted in their choice of luggage, other than that it be "in good condition."

12) The 1970 collective bargaining agreement provided that male cabin attendants (pursers and FSAs) were to receive a uniform cleaning allowance of \$13.00 per calendar quarter. Female cabin attendants did not receive this allowance.

13) Prior to June 21, 1972, the Cabin Service Manual provided that the "chain of command" aboard the aircraft, after the cockpit crew, was purser, then other male cabin attendant if one assigned, and then stewardesses in seniority order. On June 21, 1972, the Manual was changed to provide an order of purser, and then stewardesses or flight service attendants in seniority order.

14) Prior to September 1, 1971, the Company did not hire females as cabin attendants if they were taller than 5'9". The maximum height for females was raised to 6'0" on September 1, 1971. The maximum height for male cabin attendants was 6'0" at the time when the maximum for females was 5'9".

15) From the beginning of its operation until June 15, 1967, the Company followed a policy of terminating

all female cabin attendants when they married. It never had such a rule with respect to male cabin attendants. Despite a series of EEOC findings of probable cause, beginning in December, 1965, that this policy violated Title VII, the Company resisted changing its marriage rule until the conclusion of collective bargaining negotiations resulting in the June 15, 1967 agreement. At that time it agreed to abandon the policy, and to reinstate only those stewardesses terminated since the effective date of Title VII, and then only if they applied for reinstatement within three weeks of the ratification of the agreement and if they waived all claims to back pay.

16) From the beginning of its operations until 1971, the Company had a policy forbidding the hiring of married females as cabin attendants. It has never had such a rule with respect to hiring male cabin attendants. Despite an EEOC finding of probable cause, in June 1969, that this policy violated Title VII (and despite earlier EEOC findings of probable cause concerning the policy of terminating female cabin attendants when they married), the Company persisted in following this non-hire policy until February, 1971, when it entered into a conciliation agreement with the Minnesota Department of Human Rights to abandon the policy.

17) From 1956 until the June 15, 1967 agreement, the Company had a rule forbidding female cabin attendants from flying following their 32nd birthday. It never had such a rule with respect to male cabin attendants. In September 1968, the EEOC, in response to a charge filed in August, 1966, found probable cause to believe that the age 32 policy was a violation of Title VII. Between late

March, 1970, and mid-June, 1970, at least 32 stewardesses filed charges with the EEOC alleging that the Company was discriminating on the basis of sex in its treatment of female cabin attendants. On July 14, 1970, the EEOC sent "Notice of Right to Sue" to at least six of these charging parties, all of whom are named plaintiffs in this action.

40. The diverse types of flight itineraries which the Company operates, or has operated in the past, are described below:

(a) *Pure domestic commercial flights* are those regularly scheduled commercial flights which both begin and end in the United States, and do not continue on to the Orient.

(b) *Domestic segments of international commercial flights.* Since 1959, most of the Company's transpacific flights have originated in one U.S. city (generally on the East Coast), fly to the West Coast of the United States, and then to on to the Orient. Such flights return from the Orient to the West Coast, and then go on to the East Coast. Those portions of such flights which both begin and end in the United States are referred to as "domestic segments of international flights" or "domestic segments."

(c) *Transpacific commercial flights.* The Company has flown regularly scheduled transpacific commercial flights between Anchorage and Tokyo since 1947, between Seattle and Tokyo since the early 1950s, and between Honolulu and Tokyo since August, 1969.

(d) *Commercial interport flights* are those regularly scheduled flights between Tokyo and the other Asian

cities serviced by the Company (presently Osaka, Okinawa, Seoul, Taipei, Manila and Hong Kong).

(e) *Military Air Charter (MAC) flights.* For many years the Company has contracted with the U. S. Government to provide regularly scheduled military air charter flights between various cities and/or military bases. Such service has included pure domestic, domestic segment, transpacific, and interport flights. In addition from 1963 through June 1970 the Company provided MAC flights between Hawaii and several military bases in the Coral Islands in the Pacific.

(f) *Commercial charter flights.* In addition to its regularly scheduled flights, the Company frequently enters into agreements to provide commercial charter flights. Such service has included pure domestic, domestic segment, transpacific, and interport flights.

41. The diverse flight itineraries described above have been manned by cabin attendants in various manners. Some of the Company's flights are scheduled to be flown exclusively by stewardesses and FSAs. Some are scheduled to be flown by one purser and the rest stewardesses and FSAs. Some have been scheduled to be flown by more than one purser. Purser utilization on these various types of flights is described below:

(a) In general, *pure domestic* commercial flights have always been scheduled to be flown exclusively by stewardesses and FSAs. The major exceptions where pursers have been used are listed below:

(1) Between 1949 and 1954, the Company regularly scheduled a purser on each of its flights between

Seattle and Honolulu, and in recent years pursers intermittently have been scheduled on such flights; also, throughout 1970 pursers were regularly scheduled on certain pure domestic flights between Seattle and Honolulu.

(2) Throughout 1970, in an effort to enhance its service and competitive position the Company regularly scheduled a purser on its flights from Honolulu to Chicago and New York and return.

(3) At various times, in order to "position" pursers or to have pursers work while "dead heading," the Company regularly has scheduled pursers on some or all of its flights between Seattle and Anchorage.

(4) In emergency situations in which there is a shortage of available cabin attendants, due to illness, strikes, special holiday or weekend plans, or other factors, the Company has utilized reserve pursers, pursers on "time available," and pursers volunteering for overtime assignments on pure domestic flights which normally do not utilize pursers.

(b) From 1959 through 1970, the Company regularly scheduled one purser to each *domestic segment* of an international flight. The itineraries flown by pursers on domestic segments, and the periods during which pursers were regularly scheduled on such itineraries, were as follows:

(1) June, 1959-July, 1970: from Anchorage to either New York or Washington, D.C. (with intermediate stops) and return.

(2) 1960-December, 1970: Seattle to New York (with intermediate stops), and return.

(3) Approximately 1968 or 1969-mid 1970: Seattle to Philadelphia (with intermediate stops), and return.

(4) August 1, 1969-December, 1970: San Francisco and Los Angeles to Honolulu and return.

(c) One purser normally has been scheduled at all times to fly on each *transpacific* commercial flight.

(d) From 1947 to 1952, the Company's *interport* flights were manned with one American purser, as well as one American stewardess. From 1952 to 1957 no American cabin attendants flew on interport flights; they were manned exclusively by Asian cabin attendants based in Tokyo. Since 1957, one American purser normally has been scheduled on each interport flight, with the rest of the crew consisting of Asian cabin attendants.

(e) The Company always has scheduled at least one purser on each *MAC* flight, whether it be pure domestic, a domestic segment, transpacific or interport. Purser utilization on the Coral Island *MAC* flights (and the pure domestic *MAC* flights between Hawaii and California) is described in (f) below.

(f) From the inception of the *Coral Island MAC* flights (and the pure domestic *MAC* flights between Hawaii and California) in 1963 until October, 1969, at least one, and often two pursers were assigned to each flight. From October, 1969 until June, 1970 (when the Company lost its contract for such flights), the entire 3 to 5 member cabin attendant crews on such flights con-

sisted solely of pursers. From 1963 until June 1970, a small group of pursers and FSA's were based in Honolulu to fly the Coral Islands military flights. In addition, for reasons of both economics and experience, these individuals were used to fly on the military charter flights between Hawaii and California. The very small size of the Honolulu base presented special scheduling problems, even on a regular basis but particularly in emergency situations, and thus more than one purser may have worked on given flights. This was especially true from October 1969 until June 1970, as a result of the fact that all FSA's at the Honolulu base were upgraded to purser for reasons of economics, expedience and relations with NWA's military contract customers. However, paying more than one individual as a purser, pursuant to its established policy [see Finding 34], still was less costly than increasing the number of cabin attendants based at Honolulu with resulting underutilization of their time and the payment of special monthly station allowances.

(g) A purser normally has been scheduled on all transpacific and interport commercial charter flights, on all domestic segments of international charter flights (until December, 1970), and, occasionally, on pure domestic charter flights. NWA does so only if it receives a specific request from the charter group for a purser or supervisory individual, or on those special occasions when (1) pursers are the only ones available to take the flights, or (2) the positioning of pursers for other flights makes it both economic and expedient to have them fly the domestic charters.

42. The Company mans its international flights such

that a particular cabin attendant crew (including the purser if one is aboard) flies only one segment of a flight. Thus, one crew will fly the domestic segment, another the transpacific leg, and a third the interport portion. NWA has maintained cabin attendant bases at the following cities during the designated periods: Seattle (at least 1947 to date); Minneapolis-St. Paul (at least 1947 to date); Honolulu (1963 to September, 1971); and Washington, D.C. (approximately 1960 to September, 1971). Pursers have been (or were) based in Seattle from 1947 to date, in Minneapolis-St. Paul from 1947 to 1962, in Washington, D.C. from June 1969 to July, 1970, and in Honolulu from 1963 to September, 1971. Stewardesses have been (or were) based in Seattle and Minneapolis-St. Paul from at least 1947 to date, and in Washington, D.C. during the entire period that base was open. NWA also maintains cabin attendants bases in the Orient, at which are assigned all of the Asian cabin attendants who fly on the interport flights.

43. Each month, the Company constructs cabin attendant schedules, representing the itinerary to be flown by a cabin attendant during that month. Separate schedules are constructed for each cabin attendant base. At each base, separate schedules are constructed for pursers and for non-pursers (i.e., stewardesses and FSAs). The employees in each classification bid for schedules at their base in order of their seniority. Generally, purser schedules are (or have been) constructed such that all of an individual's flights in a given month will be of the same type, i.e., all MAC, all domestic segments, all pure domestic, all transpacific, or all interport (plus transpacific).

44. The Company sought and obtained a provision in

the 1967 collective bargaining agreement, entitling it to assign "foreign national" (Asian) stewardesses to the Seattle base irrespective of seniority, and to assign one foreign national stewardess to each transpacific flight irrespective of seniority. (The 1970 agreement changed the phrase "foreign national stewardess" to "stewardess proficient in the Japanese, Korean or Chinese language.") The Company desired to have foreign nationals on its transpacific flights: (a) to have a foreign language proficiency on the flight, (b) to improve the Company's relations with the Asian Governments with which it has to deal, and (c) to attract Asian passengers. Separate monthly flights schedules are constructed for foreign national stewardesses, designed to place one foreign national on each transpacific flight. Foreign nationals are permitted to bid and fly only on these separate schedules. Foreign national stewardesses, who are covered by the collective bargaining agreement, receive the same salaries as other stewardesses of equal seniority, despite their language proficiency and the restricted schedules which they are permitted to bid.

45. The Company and ALSSA engaged in negotiations in 1969 and 1970 which culminated in the March 1, 1970, collective bargaining agreement. In these negotiations, ALSSA proposed that stewardesses be allowed to progress to purser vacancies in seniority order; that stewardesses who become pursers be credited with their full cabin attendant seniority; and that stewardesses who become pursers be slotted into the purser pay scale on the basis of their total cabin attendant seniority. The Company refused to agree to any of ALSSA's proposals. Its chief negotiator stated that the Company "prefers males and intends to have them" and that the Company "wants men because of their leadership

ability." The highest ranking female employed by the Company in any capacity is a reservations supervisor. There are 200 to 300 men employed at levels above this highest ranking female.

46. On most of the Company's commercial flights, service is offered in two categories: first class and tourist class. The first class and tourist class capacities of the various planes presently used by the Company are as follows:

Plane	First Class Passengers	Tourist Class Passengers	Total Passengers
727-100	24	69	93
727-200	26	96	122
720B	16	93	109
707-320B	22	118	140
707-320C	22	120	142
747	58	304	362

47. The essential differences in service provided to the passengers in first class and tourist class are as follows:

(a) The seats and the aisles in the first class section are larger.

(b) A better quality of food service, served somewhat more elaborately, is provided in the first class section.

(c) Liquor normally is served free in the first class section, while passengers in the tourist section must purchase liquor.

(d) The number of passengers per cabin attendant is higher in the tourist section than in the first class section.

48. FAA regulations require that the various planes

used by the Company carry at least the following number of cabin attendants irrespective of passenger loads:

727-100	2
747	8
All others	3

The Company's present policy is to schedule each flight with the minimum of cabin attendants permitted, and to add additional attendants only if there are exceptionally heavy passenger loads. However, at least one additional cabin attendant is always scheduled on interport flights, so that there are more cabin attendants on such flights than on other flights with the same passenger load. The same number of cabin attendants (purser, stewardesses and FSAs) is assigned to particular aircraft with particular passenger loads, whether or not a purser is one of the attendants, and regardless of the type of flight, i.e., pure domestic, domestic segment, or transpacific (except interport).

49. In general the passenger loads in first class are smaller relative to capacity than those in tourist class, and generally, the commercial flights on which pursers regularly are scheduled have smaller passenger loads relative to capacity than the flights on which pursers are not scheduled. On non-747 aircraft, generally one cabin attendant works in first class and two in the tourist cabin. On the 747, generally two or three attendants work in first class, with five or six in tourist.

50. The relative "work pace" or "work load" of pursers and cabin attendants depends upon a number of variables, including the position being occupied by the individual in the cabin, the type of equipment, the length of the flight, the

number of passengers and the number and allocation of the cabin attendants. The smaller passenger load per cabin attendant in the first class section (where the purser works) normally results in a more leisurely work pace than in the tourist section. The workspace and workload on cabin attendants is normally greater on "short hop" schedules than on longer segment flights.

51. Virtually all duties assigned to cabin attendants are performed by all cabin attendants, regardless of classification. In general, cabin attendants are responsible for making pre-departure checks of the cabin; greeting and seating passengers; securing the cabin for take-off; providing food and beverage service, tending to passenger needs; briefing passengers on emergency procedures; guiding and assisting passengers in the event of emergencies; completing required documentation; answering passenger questions; keeping the cabin in a neat and orderly condition, before, during, and after the flight; insuring that passengers conform to required regulations; and deplaning passengers.

52. One of the most important (if not the most important) responsibilities of all cabin attendants is insuring, to the greatest extent possible, the safety of passengers in the event of an emergency. All cabin attendants must have detailed knowledge of first aid techniques and be able to deal on an instantaneous basis with a myriad of medical emergencies in flight. All cabin attendants are required to possess a thorough knowledge of emergency procedures and equipment on each type of aircraft the Company operates. To this end (a) a great portion of a cabin attendant's initial pre-hire training is devoted to emergency procedures and equipment; (b) every year each cabin attendant is required to complete an Emergency Recurrent Training course and

pass examinations related thereto (or be grounded); (c) each attendant must take a training course in aircraft familiarization each time a new type plane is put into use; (d) pre-departure emergency briefings are conducted by the Senior Cabin Attendant prior to *every* flight; (e) each attendant is required to have thorough knowledge of the voluminous and detailed emergency instructions contained in the Cabin Service Manual; and (f) cabin attendants periodically are evaluated by means of unannounced check rides by supervisors, which include testing on emergency procedures and equipment.

53. Aside from doing everything possible to insure passenger safety in the event of an emergency, the most important aspect of the job of all cabin attendants, whatever their classification, is acquiring and maintaining the goodwill of the Company's passengers. The Company is in the business of, and derives its revenues and profits from, transporting persons from one place to another. The success of the Company depends upon the goodwill of the passengers, the confidence they have in its ability to perform the services offered and the respect they have toward the Company. All cabin attendants play an extremely important part in dealing with the public since they are in contact with the passengers for a prolonged period of time, indeed, for far greater periods of time than any other Company representatives. Thus, no matter which particular duty a cabin attendant is performing at a particular time, as it involves passenger contact the cabin attendant must exercise a high degree of poise, tact, friendliness, good judgment and adaptability.

54. The type and quality of food service offered by the Company varies greatly between its flights, and between

first and tourist class sections. The Company offers the following types of food service:

(a) Pre-set casserole service, which is boarded onto the aircraft in pre-set fashion, and requires the cabin attendants to heat the entree item in an oven aboard the aircraft, place it upon the pre-set tray, and deliver the entire meal at one time on a tray to the passenger.

(b) Out-of-galley china course service in which the food is loaded aboard the aircraft in bulk, heated by the cabin attendants in bulk, and is dished onto china dinnerware by the cabin attendants and carried from the galley to the passenger. The meal is served in various courses.

(c) Cart service, which is virtually identical to out-of-galley china course service, except that each course is served to the passenger from a serving cart located in the aisle in front of the passenger. On some flights, a combination of the above types of food service is offered.

55. The pre-set casserole service is generally utilized in tourist class on all of the Company's scheduled commercial flights. This service with meals of a higher quality is regularly used in first class. All types of services variously are (or have been) utilized in first class, the domain of the senior cabin attendant—purser or stewardess. The Company's cabin service manual and periodic service bulletins issued to all cabin attendants carefully describe the preparation and serving procedures for each type of meal service, and the duties of the various cabin attendants with respect to that service.

56. Food and beverage service is one of the competitive components of the Company's passenger service. The Com-

pany meets its stiffest competition in this service area on the international routes on which the pursers are present. During the period 1965-1970, in an effort to upgrade the food and beverage service on these flights, the Company hired pursers with food and beverage skills and experience. It also gave special training to pursers and interested cabin attendants in an internationally flavored cart service cuisine. The purser was principally responsible for the proper utilization of this service. Normally the purser dished the food and mixed the drinks while stewardesses served and took orders. Currently, this service is utilized in a more limited fashion on the 747s as an extension of the galley. On flights between Anchorage and Tokyo, which utilize 320 equipment, the full cart service is still used.

57. Pursers perform no duties with respect to food service which are not also performed by stewardesses, either on the same flight or on other flights. The duties assigned to the Senior Cabin Attendant in the preparation and service of cart service are identical, whether such attendant is a purser or a stewardess. The duties of the Senior Cabin Attendant (purser or stewardess) in the preparation and service of first class meals where cart service is not utilized are identical to those of the other first class attendants (where there are such). With respect to food service on MAC and commercial charter flights (and on other flights with no first class service at all), the duties of the Senior Cabin Attendant are the same as all other cabin attendants on such flights.

58. All cabin service attendants variously have certain responsibilities with respect to documentation. Both pursers and stewardesses have certain major responsibilities with respect to liquor service and documentation pertaining

thereto. On all regularly scheduled commercial flights, liquor is provided without charge in first class and is sold to passengers in tourist class. No liquor is served on MAC flights. Thus pursers are not responsible for liquor sales and receipts. Cabin service attendants who do sell liquor are responsible for collecting the appropriate prices in whatever currency tendered and when necessary convert Asian currencies into U.S. equivalents. They are required to complete Company records with respect to the beginning and ending inventories of liquor "kits" boarded and a sales and deposit record (Form AC-237) and a beverage usage report form (Form FS-59). In first class, only a beverage use form is required (Form FS-7 or FS-11). On flights carrying tax free liquor, certain United States custom inventory forms must be completed in both first class and tourist. Cabin attendants are subject to discipline for improper completion of any of these forms and the Company is subject to a fine for the improper completion of the United States Customs liquor inventory forms.

59. There are certain other Company documents and forms which all cabin attendants are responsible for at various times:

(a) On all flights, the senior cabin attendant and the senior in tourist must complete the In-Flight-Service report (Form FS-23) on which are recorded the names of the cabin service crew, passenger count, number of beverages sold and meals boarded, departure and arrival times, and comments regarding services or special or unusual events during flight.

(b) On all flights, the senior cabin attendant and the senior in tourist must complete the log book in which are recorded cabin items requiring servicing or repair.

(c) On all non-747 flights, the senior cabin attendant and the senior in tourist must prepare seating charts. Seating charts are not required on international 747 flights but are required in first class on domestic 747 flights.

(d) On all flights, where circumstances require, completion of forms pertaining to in-flight movies, ticket upgrading, meal vouchers, accident reports and lost and found articles. Cabin attendants are subject to discipline for improper completion of these forms.

60. In addition to the Company forms, and the U. S. Customs forms related to liquor, various governments require that certain documentation be handled by the airline. Cabin attendants (generally the senior cabin attendant) have certain responsibilities with respect to such documentation, which are described precisely in the Cabin Service Manual and cabin service bulletins. There are certain government documentation duties performed on both purser and non-purser flights.

1) On all flights from mainland U.S. to Hawaii the Senior Cabin Attendant, almost always a stewardess, is responsible for:

(a) Passing out and collecting an agricultural declaration form (Form A), upon which each passenger is to list any plants or live animals which he is bringing into Hawaii. In passing out the form, the Senior Cabin Attendant tells the passengers what the form is about, and explains how they will know whether or not they are required to fill it out.

(b) Spraying the cabin with an insecticide prior to

arrival and recording such on a Certificate of Disinsectization. (From October 1969 to December 1970, pursers were regularly assigned to some, but not all, of such flights. Between 1954 and 1969, and since 1971, only stewardesses (and FSAs) have been regularly scheduled on these flights.)

2) On flights from the U.S. to Winnipeg, stewardesses are responsible for passing out Canadian customs and immigrations forms to passengers, seeing that the appropriate passengers complete them in flight, and answering passenger questions about them. On flights from Winnipeg to the U.S., stewardesses are responsible for passing out U.S. customs forms (Form 6059-B) to passengers, seeing that they are completed in flight and answering passenger questions about them.

3) The U.S. Immigration Service has had an agreement with the Company since 1967 which permits the Company to accept for passage aliens transiting the U.S. without a visa ("TRWOV"). The Company assumes the responsibility of the alien's continuous transit through, and departure from the U.S., and severe penalties will be levied if a TRWOV passenger should deplane and disappear within the U.S. TRWOV passengers are carried on flights both with and without a purser. Such passengers are placed in the custody of the Senior Cabin Attendant, who must assume direct personal responsibility to assure safe delivery and transfer of TRWOV passengers. The Senior Cabin Attendant maintains custody of the TRWOV passenger's travel documents during the flight. Failure to carry out these responsibilities subjects the cabin attendant to discipline.

4) On all international flights, all cabin attendants

are required to complete properly their own customs forms, and also are required to carry a valid passport. Failure to properly comply with these responsibilities subjects the attendant to discipline and can result in fines of the attendant and the Company.

61. The various governments at all of the international ports served by the Company impose certain policies, procedures and practices with respect to customs, immigration and quarantine (CIQ) requirements. As at the inception of the purser classification in 1947, the purser today is responsible for managing the international CIQ documentation requirements for passengers, crew and cargo. The various governmental CIQ documentation requirements vary and change from port to port, so that pursers are responsible for knowing and complying with these different and changing requirements at United States ports and at each of the various foreign ports, including Tokyo, Osaka, Seoul, Okinawa, Taipei, Hong Kong and Manila. The various international CIQ documents and the detailed procedures with respect to each are subject to frequent revision, sometimes with little or no advance warning. Pursers are required to remain constantly abreast of these changes and to implement them, on many occasions even prior to receiving official instructions or directions from NWA. In addition, there are separate documents required on NWA's military contract flights, which requirements vary with the location of the base. In general, these CIQ duties fall into four categories:

(a) *Transporting a pouch*—receiving and checking the contents of a pouch containing various government documentation from a Company transportation agent

(ground personnel) prior to departure and delivering it to another Company transportation agent upon arrival.

(b) *Assembling "manifest books"*—these generally contain copies of the General Declaration, cargo manifests and (on some interport and MAC flights) a passenger manifest. Cargo and passenger manifests (which constitute listings of cargo and passengers aboard the flight, respectively) are filled out by Company transportation agents, placed in folders by place of destination and delivered to the purser in the pouch prior to departure. The purser makes no entries on the manifests. The required number of manifest books (specified in the Cabin Service Manual) are prepared by sorting copies of the cargo manifests into an order specified in the Manual and stapling the bundle together with the General Declaration (and, if there is one, the passenger manifest) to form a "book." On MAC flights there are rarely any cargo manifests. The books are turned over to Company transportation agents upon arrival, who in turn distribute them to government personnel.

(c) *Passing out various customs, immigrations and/or quarantine forms*—these are forms which passengers are required to fill out prior to landing. The required forms for each port are placed into the pouch by Company transportation agents prior to departure, segregated for each port. The purser (and occasionally other cabin attendants) passes the forms out to the passengers, who complete and retain them to turn over to government officials after arrival. While the passenger immigration forms vary slightly from country to country, the basic information called for by the forms is essentially the same: name of passenger, address, citizenship, passport number,

and address while in country. Likewise, while the passenger customs forms vary slightly from country to country, the basic information called for—goods being brought into the country which were purchased in other countries—remains the same. The forms are printed in both English and the applicable Asian language, and most are self-explanatory and/or contain written instructions on their completion. Pursers (as well as other cabin attendants) answer passenger questions regarding such forms to the extent that they know the answers. Neither pursers nor stewardesses are responsible for knowing the answers to questions unless the information necessary to answer is contained in the Cabin Service Manual. Stewardesses know the answers to most questions. Pursers have no responsibility for completing passengers forms. Procedures with respect to passing out the passenger forms are detailed specifically in the Manual.

(d) *Making entries on certain documents*—pursers are responsible for making entries on only two government documents (other than the U.S. Customs liquor form)

(1) General Declaration (Form 7507): most of the form is completed by Company transportation agents. The purser checks crew passport numbers for accuracy, enters the number of passengers, recites that he has sprayed the plane, and lists any passengers whom the attendants believe to be ill. The General Declaration is required only on transpacific interport flights (commercial and MAC).

(2) Aircraft/Vessel Report (I-92): this is a U.S. immigration form used to record an aircraft's entry into

or exit from the U.S. It is used only on west-bound domestic segments of international flights and on Tokyo to U.S. transpacific flights. The purser enters the name and nationality of the airline (always the same, i.e., "Northwest USA"), flight number, date, ports of arrival and departure (always Seattle, Anchorage or Honolulu, and Tokyo), ports of destination, total number of passengers, and number of passengers bound for each port. It takes fifteen or twenty seconds for the purser to fill out the I-92. He turns it over to a Company transportation agent upon arrival.

62. The government documentary duties of pursers described in the paragraph above are not all required on all purser flights. Pursers perform the following documentary duties on the various types of flights on which they are (or were) used:

- (a) On pure domestic flights: none.
- (b) On the eastbound portion of domestic segments: transporting the pouch only.
- (c) On the westbound portion of domestic segments: transporting the pouch, U.S. passenger immigrations form (I-94), and, during certain periods of time, Aircraft/Vessel Report (I-92).
- (d) On U.S. to Tokyo flights: manifest books, passenger forms, and General Declaration.
- (e) On Tokyo to U.S. flights: manifest books, passenger forms, during certain periods Aircraft/Vessel Report (I-92), and General Declaration.

(f) On interport flights: manifest books, passenger forms, and General Declaration.

63. Pursers are instructed and expected to carry out their international documentation responsibilities during times when there is little or no passenger service. While they are engaged in these tasks, the other cabin attendants provide any needed passenger service and perform their other assigned tasks. All documentation duties are in addition to and not in place of regular passenger service duties for all cabin service personnel. Pursers are responsible and accountable for the international documentation. Pursers have not been disciplined to any greater extent or degree for failing to properly perform their tasks with respect to government documentation than have other cabin attendants been disciplined for failing to properly perform their tasks with respect to Company and government documentation. Of all pursers employed at any time since 1965, only two have ever been suspended (one time each for a period of two days each) for improper performance with respect to government documentation, whereas stewardesses have received suspensions of greater duration for improper document work (including, for example, one 2-day and one 4-day suspension received by one stewardess, who was a witness at a trial, for failing to submit her own pay forms on time).

64. The documentary duties described which are (or were) assigned only to pursers involve no greater skill, effort or responsibility than does the documentary duties assigned to all cabin attendants. In addition the documentary duties of the purser does not make that job, in the aggregate, one requiring greater skill, effort or responsibility than the stewardess job.

65. The Company's Cabin Service Manual contains a "chain of command" during flight. The pilot is first in the chain of command, the co-pilot second, the third member of the cockpit crew is third and the "Senior Cabin Attendant" is fourth in the chain of command. If one purser is aboard, he is denominated the Senior Cabin Attendant irrespective of his relative length of service as compared to the other cabin attendants. If two or more pursers are aboard the flight, the most senior purser is the Senior Cabin Attendant. If no purser is aboard the flight, the most senior stewardess or FSA is the Senior Cabin Attendant. On interport flights, however, the male Asian FSA (who is assigned to most interport flights) is automatically the Senior in Tourist regardless of his seniority. It is rare that the captain or other members of the flight deck crew become involved in matters pertaining to cabin service or cabin attendants although all cabin attendants are subject to the authority and direction of the captain who is completely responsible for all crew members.

66. Among the cabin attendant crew, the Company's Cabin Service Manual provides that a purser shall always be considered the senior attendant and shall coordinate the activities of the other attendants and shall be held "responsible and accountable" for conduct of service on the entire flight. Absent a purser, the cabin attendant with the most seniority shall be the senior attendant also responsible for the coordination of cabin service activities on the entire flight but accountable only for the conduct of service in that section of the aircraft in which he or she works, the accountability in the remaining section or sections being placed on the senior attendant in that section. Duty assignments aboard the flight are made by the senior cabin attendant. Pursers are always assigned to the first class section.

67. Senior cabin attendants (whether purser or stewardess) engage in the following activities in discharging their "supervisory" responsibilities:

- 1) Monitoring and where necessary correcting work of other cabin attendants.
- 2) Determining time of meal service and movie showing.
- 3) Moving attendants from section to section to balance work loads.
- 4) Give pre-departure briefings on emergency equipment and procedures.

Stewardesses who serve as Senior Cabin Attendant are subject to discipline if they fail to carry out their "supervisory" responsibilities, and are held just as accountable as pursers who fail to carry out their "supervisory" responsibilities. Stewardesses who serve as Senior in Tourist are likewise subject to discipline if they fail to carry out their supervisory responsibilities. The Company does not maintain a merit system whereby either pursers or stewardesses who "supervise" well are paid more than those who do not supervise as well. All pursers are paid on the same scale, and all stewardesses on the same scale, regardless of how well or poorly they supervise.

68. The duties of each cabin attendant position are clearly defined in the Cabin Service Manual and cabin service bulletins. The Manual presents information, responsibilities, and instructions for cabin attendants in a clear and concise manner. It describes in detail cabin attendant duties, procedures and responsibilities. Each cabin attendant is required to be thoroughly familiar with all material covered

in the Manual, and procedures in the Manual are expected to be followed explicitly. As cabin attendants acquire experience, they are better able to perform their duties with less need for coordination by the Senior Cabin Attendant. Relatively new attendants are less certain of their duties and how to perform them, and require closer watching and guidance than do more senior attendants. Normally, all of the stewardesses on flights on which pursers are assigned are relatively senior and experienced. The pursers' "supervisory" responsibilities therefore normally are less demanding than the "supervisory" responsibilities of stewardesses who serve as Senior Cabin Attendants on domestic flights with more junior stewardesses. Because the cabin attendants with the greatest seniority almost always elect to work in the first class cabin forcing the more junior and less experienced cabin attendant to work in the tourist class cabin, and because there are more cabin attendants in tourist class than in first class, the Senior in Tourist normally spends greater time and effort in coordinating the duties of other cabin attendants than does the Senior Cabin Attendant, on both purser and non-purser flights.

69. The Company hired, trained and promoted individuals in the purser classification with the expectation that they would exercise leadership and supervisory responsibilities immediately upon being placed as pursers. As automatic "senior cabin attendants" on all flights to which pursers were assigned, pursers are "responsible and accountable for the entire cabin service staff." Cabin Service Attendants other than pursers, who functioned on particular flights as the "senior cabin attendant" are "responsible for the entire flight" in the proper coordination of cabin service activities but "accountable" only for the conduct of service in the

section of the aircraft to which assigned. In the performance of the duties of the purser and the non-purser senior cabin attendant, responsibility is synonymous with accountability. Only in the purser's formal relationship with the Company does his accountability differ from the non-purser senior cabin attendant and that difference is derived from status rather than as a function of the job. Cabin service attendants are employed to serve and protect Company passengers. The "supervisory" functions of senior cabin attendants—whether purser or stewardess—are less important than, and require no greater skill, effort or responsibility, than the other functions assigned to all cabin attendants.

70. Pursers are paid on a different and higher pay scale than other cabin service attendants. In each round of collective bargaining negotiations since at least the mid-1950's, the union proposed that stewardesses serving as Senior Cabin Attendant receive a supplement to their pay. In each instance, the Company has refused on the asserted ground that the longevity step provisions of the stewardess pay scale, which pay more senior stewardesses more than relatively junior stewardesses, together with the requirement that the most senior stewardess on a flight serve as Senior Cabin Attendant, provided added compensation for performing in that position.

71. When pursers were scheduled regularly on pure domestic flights, their duties were identical to those performed by the Senior Cabin Attendant on domestic flights without a purser. Pursers had no documentary duties on such flights which are not performed by stewardesses on other flights. When pursers were regularly assigned to domestic segments of international flights (1959 through December, 1970),

their duties (other than the minor documentary responsibilities previously described) were identical to those performed by stewardesses serving as Senior Cabin Attendant on non-purser domestic flights. The only respect in which the duties of the purser as Senior Cabin Attendant on transpacific and interport flights differs from those of a stewardess as Senior Cabin Attendant on non-purser flights is that pursers perform certain government documentation responsibilities. These documentation duties do not make the purser job one requiring greater skill, effort or responsibility than the stewardess job. When the Company decided to remove pursers from the domestic segments of international flights in December 1970, it made no changes of any kind in the duties assigned to, and performed by, cabin attendants on the east-bound portions of such flights. The only change made with respect to the west-bound portion of such flights was that Company transportation agents, who had "always" had "the responsibility . . . to insure that each out-bound alien has a properly completed I-94" (U. S. Immigrations form) were now assigned the additional responsibility to collect the I-94s (which pursers had previously done in flight).

72. The work of all cabin attendants on MAC flights is less demanding than on other flights. There is no class service, no liquor is served, the food service is less elaborate than even in the tourist section of commercial flights, and the passengers are less demanding. The purser's government documentation duties on MAC flights, where there are any, are relatively minor. On the MAC flights flown out of Honolulu, on which there frequently was more than one purser assigned, and on which *all* cabin attendants were pursers from October 1969 through June 1970, the duties of all but the most senior purser (Senior Cabin Attendant) were iden-

tical to the duties performed by stewardesses on other MAC flights. This is also true on the occasions when more than one purser is assigned to commercial flights.

73. A substantial percentage of the Company's overall utilization of pursers consisted of their assignment to pure domestic flights or to domestic segments of international flights. Many pursers flew such flights exclusively, for months or years at a time. In December, 1970, following the filing of this lawsuit and the BRAC strike, the Company removed pursers from pure domestic flights and domestic segments of international flights. Similarly, a substantial percentage of the Company's utilization of pursers has consisted of their assignment to MAC flights. Many pursers flew such flights exclusively, for months or years at a time.

74. Until January 1971, both purser and stewardess schedules normally were constructed so that the maximum number of consecutive nights away from home on a trip during the month ranged from zero to six nights. In and after January 1971, the Company redesigned its purser schedules so that many, but not all, pursers would be away from home on a trip during the month from eight to thirteen consecutive nights. Stewardess schedules continue to be constructed so that the normal maximum number of consecutive nights away from home on a trip during the month range from zero to six, although some schedules require more.

75. Until January, 1971, purser and stewardess "nights away" working conditions were not dissimilar at all. The eight to thirteen day trips which some pursers have flown since January, 1971, do not constitute substantially dissimilar working conditions from those of other cabin attendants. More consecutive days away from home also means more

consecutive days at home during the month. The preferences of cabin attendants in this regard are highly subjective—some prefer one long trip a month, while others prefer several shorter trips; some find that remaining in the Orient for several consecutive days easier on their “biological clock” than repeated transpacific flights with frequent time zone changes. Because ground time is not counted toward flight time, purser schedules (encompassing longer flights) entail fewer actual hours of work, and fewer days away from home, than short-hop domestic stewardess schedules.

76. Although pursers have flown for many years to Manila, Okinawa, Taipei and Seoul on interport flights, the Company's schedules have never required, until 1972, that they layover in those cities. Pursers flying interport normally begin and end their day in Tokyo, flying round-trip flights to other Asian cities. From 1947 to the present date, American stewardesses regularly have had layovers in Tokyo. In 1966, the Company obtained authorization to fly to Hong Kong. At various times thereafter, the Company has constructed some purser interport schedules providing for one night layovers in Hong Kong. Those few pursers who have layovers in Hong Kong (or, recently, other Asian cities) do not have working conditions dissimilar from those of cabin attendants who do not layover in interport cities. (In addition, stewardesses flying on certain MAC flights have had layovers in interport cities.)

77. Interport flights are manned with an American purser and Asian stewardesses and FSAs (all of whom speak English). For years, substantial numbers of purser schedules were constructed so that they required no interport flying at all, and, therefore, the pursers filling such schedules

did not have layovers in Hong Kong or fly with Asian cabin attendant crews. This included, *inter alia*, all pursers based in Washington, D.C. and in Honolulu. From 1952 to 1957 no American pursers at all were scheduled on interport flights. Flights flown by pursers with Asian cabin attendants pose no more difficult or different working conditions than flights without Asian attendants.

78. The job of purser and the job of stewardess require equal skill, effort and responsibility and are performed under similar working conditions.

79. The compensation of all cabin attendants is established through collective bargaining. There are two separate base salary scales—one for pursers and one for stewardesses (and FSAs). Each scale provides for longevity step increases. Pursers presently receive the top step in their sixth year as a purser, whereas stewardesses receive the top step in their ninth year. The base salary of both pursers and stewardesses is based upon 67 flight hours per month. Additional flight hours are compensated by an hourly incentive (overtime) rate (higher for pursers than for stewardesses). In addition, stewardesses who engage in “foreign flying—defined as all flights to or from any foreign country, Alaska, or Hawaii (but excluding Winnipeg, Canada)—receive a \$1.00 per hour supplement for each hour flown on such flights.

80. Pursers' salaries are, and always have been approximately 30 to 55 percent higher than those of stewardesses of equal longevity engaged in domestic flying, and approximately 20 to 35 percent higher than stewardesses of equal longevity engaged solely in “foreign flying.”

81. The Company maintains records which enable it to determine what flight a given cabin attendant has flown

each day, the position held each day, and the time spent by that cabin attendant each day. These records enable the Company to pay cabin attendants different amounts for different portions of their monthly service. FSA's temporarily filling purser vacancies are paid the purser rate only while flying as pursers. Stewardesses flying international receive the "foreign flying" supplement only for the hours spent on the international flight. Permanently assigned pursers receive the purser rate and those of a given longevity the same salary whether or not they are filling the purser position on the flight and irrespective of the kind of flight, domestic, foreign or interport. Except for the "foreign flying supplement" all stewardesses of a given longevity receive the same salary, irrespective of the nature of the flights or the position occupied on the flight.

### CONCLUSION OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of this action, pursuant to the provisions of the Equal Pay Act [29 U.S.C. §206(d)] and Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000 (e)].

2. Northwest Airlines, Inc. has discriminated on the basis of sex in willful violation of the Equal Pay Act, 29 U.S.C. §206(d)(1), 29 U.S.C. §255(a), on jobs the performance of which require equal skill, effort and responsibility and which are performed under similar working conditions by:

(a) Paying female stewardesses lower salaries and pensions than male pursers.

(b) Providing less expensive and less desirable lay-over accommodations than male cabin attendants.

(c) Providing female stewardesses no cleaning allowance while providing a uniform cleaning allowance to male cabin attendants.

3. Northwest Airlines, Inc. has discriminated on the basis of sex in willful violation of the Equal Pay Act, 29 U.S.C. §206(d)(1), 29 U.S.C. §255(a), by paying Mary P. Laffey a lower salary as a purser than it pays to male pursers with equivalent length of cabin attendant service.

4. Northwest Airlines, Inc. has violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-2(a), (hereinafter "Title VII"), by paying female stewardesses lower salaries and pensions than male pursers for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

5. Northwest Airlines, Inc. has violated Title VII:

(a) By discriminating against females because of their sex in filling purser vacancies from July 2, 1965 to date.

(b) By providing from June 15, 1967 to date that stewardesses who became pursers do not get credit for their stewardess seniority on the purser seniority list, whereas male FSA's who have become pursers (both before and after June 15, 1967), get credit for their FSA seniority on the purser list.

(c) By providing that stewardesses who become pursers do not get credit for their stewardess seniority on the purser seniority list, thus perpetuating the effects of past discrimination from June 15, 1967 to date.

(d) By providing that stewardesses who become pursers are slotted at the bottom of the purser pay scale and thus receive lower salaries than male pursers with equal cabin attendant longevity, thus perpetuating the effects of past discrimination from June 15, 1967 to date.

(e) By changing its procedures and standards for selecting pursers, lengthening the probationary period, denying consideration of purser bids to stewardesses who have not flown with a purser for four years, according automatic preference to junior pursers over senior stewardesses in bidding for purser vacancies, discouraging and attempting to deter stewardesses from bidding on purser vacancies, failing to post notices of all purser vacancies at all cabin attendants bases, from June 15, 1967 to date.

(f) By demoting Mary P. Laffey from purser to stewardess and continuing her as a stewardess, by paying her a lower salary as a purser than it paid male pursers hired as cabin attendants subsequent to her, thus perpetuating the effects of past discrimination.

(g) By imposing a "chain of command" aboard its planes under which all male cabin attendants, irrespective of classification or length of service were superior to all female cabin attendants.

(h) By forbidding only female cabin attendants to wear eyeglasses, to be without cleaning allowances, to have free choice of luggage, to have single rooms on layovers, to be without weight prescriptions and weight monitoring and by imposing a shorter maximum height requirement for female cabin attendants.

6. Each of the above enumerated Title VII violations are continuing violation, and each continued during the 90 day period preceding the filing of charges with the Equal Employment Opportunities Commission and therefore, none is barred by the provisions of 42 U.S.C. §2000(e)-5(d).

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

/s/ AUBREY E. ROBINSON, JR.  
Judge

DATED: November 12, 1973

**APPENDIX B****[CAPTION]****MEMORANDUM**

This matter is before the Court for entry of a Final Order with regard to damages and remedies. Findings of Fact and Conclusions of Law establishing liability herein were entered by the Court on November 12, 1973. The parties have intensively and thoroughly briefed and argued the present issues. Two matters merit brief comment.

The Court has not awarded liquidated damages under the Equal Pay Act. Implicit in this is a finding that Defendant has sustained its defense under 29 U.S.C. §260. The Defendant did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any griev-

ances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point. The Court finds "good faith" on the part of the Defendant and this finding is not inconsistent with the earlier finding of a "willful" violation of the Equal Pay Act. See *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971). The Equal Pay Act violation was willful in that Defendant was fully aware of the Equal Pay Act and adopted a deliberate and knowing course of conduct despite its awareness. The Court does not find an intentional, bad faith, attempt to evade the law. The judgment of the Company that its conduct would not be found to be in violation of the Equal Pay Act has been found to be in error. The conduct of the Company in the exercise of that judgment was willful.

The second matter which warrants discussion is the recovery period for back-pay under Title VII. The Court has allowed a recovery period extending back two years from the date on which the charges herein were lodged with the Equal Employment Opportunity Commission. The Court has discretion to award back-pay to July 2, 1965, but has chosen to limit that award herein. The 1972 amendment to Title VII, 42 U.S.C. §2000e-5(g), limiting back-pay liability to not more than two years prior to filing of charges with the E.E.O.C. is not applicable to this case. Nevertheless, it does indicate that Congress felt some limitation is appropriate to avoid "windfall" damage awards and to avoid harsh, and sometimes unbearable, economic burdens upon employers. The amendment also indicates that two years is an appropriate and reasonable period for measuring the adequacy of the remedy for the Plaintiffs. In light of these considera-

tions, the Court has, in the exercise of its discretion, limited the recovery period.

/s/ AUBREY E. ROBINSON, JR.  
United States District Court

DATE: April 3, 1974

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### ORDER

The Court having heretofore issued findings of fact and conclusions of law, and having held therein that defendant Northwest Airlines, Inc., violated the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, in enumerated respects; and all parties having filed briefs and presented oral argument with respect to the remedy questions; it is by the Court this 3rd day of April, 1974;

ORDERED, as follows:

1. GENERAL INJUNCTION—The Defendant Northwest Airlines, Inc., and its officers, agents, employees, successors and all persons or organizations in active concert or participation with it, hereby are permanently enjoined and restrained from discriminating in any aspect of employment of cabin attendants on the basis of sex and from failing or refusing to fully implement, or to participate and cooperate in the implementation of, the provisions set forth in the body of this Order.

2. DEFINITIONS—For purposes of this Order, the following definitions shall apply:

(a) The term "Company" shall refer to Northwest Airlines, Inc.

(b) The term "Union" shall refer to Air Line Pilots Association, or any labor organization which succeeds it as bargaining representative of the Company's cabin attendants.

(c) The term "cabin attendant(s)" shall refer, collectively, to all American-based employees of the Company whose principal duties consist of providing in-flight cabin service, whether denominated stewardess, purser, flight service attendant, steward, or otherwise.

(d) The term "Equal Pay Act plaintiff(s)" shall refer, collectively, to all female cabin attendants employed by the Company who filed timely written consents with this Court, in accordance with 29 U.S.C. §256, to become parties plaintiff with respect to the Equal Pay Act aspects of this lawsuit.

(e) The term "Title VII plaintiff(s)" shall refer, collectively, to all female cabin attendants employed by the Company at any time on or after July 2, 1965, excluding only those who filed timely written elections with this Court to be excluded from this lawsuit in its entirety.

(f) The term "Equal Pay Act recovery period" shall refer, for each Equal Pay Act plaintiff, to the period commencing three years prior to the date said plaintiff filed a written consent with this Court and ending on the date the Company equalizes wages in accordance with Paragraph 3 of this Order.

(g) The term "salary" shall refer to pay for services performed, as well as such other benefits (e.g. paid leave, life insurance) as are computed on the basis of salary.

### 3. EQUALIZATION OF WAGES—AFFIRMATIVE INJUNCTION.

(a) *Salary*: Beginning with the date of this Order, the Company shall pay all female cabin attendants the salaries prescribed in the purser pay scale (base pay, and incentive pay if any) of the then-current collective bargaining agreement. The longevity of each female cabin attendant for purposes of applying the purser pay scale shall be her system seniority. Thereafter, the Company shall not reduce the salary of any cabin attendant below the level to which said purser pay scale entitles her at any given time, her longevity for pay purposes at such time being her system seniority.

(b) *Pensions*: Beginning with the date of this Order, any pension payment made to any female cabin attendant shall be computed as though said female cabin attendant had been classified and paid as a purser throughout the period of her employment as a cabin attendant.

(c) *Lodging*: Beginning with the date of this Order, the Company shall furnish single rooms to all female cabin attendants on layovers, which shall not be inferior in quality to those heretofore provided to male cabin attendants. Thereafter, the Company shall not assign double rooms to any female cabin attendant, nor provide rooms to any female cabin attendant inferior in quality to those heretofore provided to male cabin attendants.

(d) *Uniform Cleaning Allowance*: Beginning with the date of this Order, the Company shall provide a quarterly uniform cleaning allowance to each female cabin attendant in accordance with the following standards as to eligibility and amount:

(i) *Eligibility*: To be eligible for a uniform cleaning allowance in a particular calendar quarter, she must have been employed as a cabin attendant on the first day of that quarter and she must have been so employed for the last full calendar month preceding such first day of the quarter.

(ii) *Amount*: The amount of the uniform cleaning allowance in each quarter shall be \$13 prorated on the basis of the time on payroll as a cabin attendant employee in such quarter.

(e) *Prohibition against reducing wages to comply*: The Company shall not, contrary to 29 U.S.C. §206(d)(1), reduce the wage rate of any employee in order (a) to accomplish the equalization required by this Paragraph 3 or (b) otherwise to comply with the provisions of 29 U.S.C. §206(d)(1).

4. *INJUNCTION AGAINST FUTURE WAGE DISCRIMINATION*—The Company shall not, contrary to 29 U.S.C. §206(d)(1) or 42 U.S.C. §2000e-2(a) and (h), discriminate on the basis of sex between cabin attendants by paying wages to cabin attendants at a rate less than the rate at which it pays wages to cabin attendants of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions.

5. *MONETARY AWARD FOR THE EQUAL PAY ACT VIOLATIONS*—The Company shall pay to each Equal Pay Act plaintiff the following monetary amounts:

(a) For each month during her Equal Pay Act recovery period in which she received a salary from the Company for service as a cabin attendant, the difference between the

salary actually paid to her (including base pay, foreign flying supplement if any, and incentive pay if any) and the salary (base pay, and incentive pay if any) which would have been paid to her had she been compensated as a purser with longevity for pay purposes equal to her system seniority.

(b) If she received pension payments during her Equal Pay Act recovery period, the difference between the pension payments made to her and those which would have been made to her had they been computed on the basis of her having been classified and paid as a purser throughout the period of her employment as a cabin attendant.

(c) For each layover during her Equal Pay Act recovery period in which the lodging furnished by the Company required her to share a double room, the difference between one-half the value of the double room actually provided to her and the value of a single room had it been provided to her.

(d) For each calendar quarter from March 1, 1970 until the end of her Equal Pay Act recovery period, a uniform cleaning allowance in accordance with the following standards as to eligibility and amount:

(i) *Eligibility*: To be eligible for a uniform cleaning allowance in a particular calendar quarter, she must have been employed as a cabin attendant on the first day of that quarter and she must have been so employed for the last full calendar month preceding such first day of the quarter.

(ii) *Amount*: The amount of the uniform cleaning allowance in each quarter shall be \$13 prorated on the basis of the time on payroll as a cabin attendant employee in such quarter.

**6. BACKPAY UNDER TITLE VII FOR WAGE DISCRIMINATION AGAINST EQUAL PAY ACT PLAINTIFFS**—The Company shall pay backpay to each Equal Pay Act plaintiff who was employed as a cabin attendant at any time between March 28, 1968 and the day preceding the commencement of her Equal Pay Act recovery period, to remedy the pay discrimination visited upon her during said period in violation of Title VII. The amount of backpay for each such Equal Pay Act plaintiff shall be as follows:

(a) For each month between March 28, 1968, and the day preceding the commencement of her Equal Pay Act recovery period in which she received a salary from the Company for service as a cabin attendant, the difference between the salary actually paid to her (including base pay, foreign flying supplement, if any, and incentive pay, if any) and the salary (base pay, and incentive pay, if any) which would have been paid to her had she been compensated as a purser with longevity for pay purposes equal to her system seniority.

(b) For each layover between March 28, 1968, and the day preceding commencement of her Equal Pay Act recovery period, the difference between one-half the value of the double room actually provided to her and the value of a single room had it been provided to her.

**7. BACKPAY UNDER TITLE VII FOR WAGE DISCRIMINATION AGAINST TITLE VII PLAINTIFFS WHO ARE NOT ALSO EQUAL PAY ACT PLAINTIFFS**—The Company shall pay backpay to each Title VII plaintiff who is not also an Equal Pay Act plaintiff to remedy the pay discrimination visited upon her in violation of Title VII.

The amount of backpay for each such Title VII plaintiff shall be as follows:

(a) For each month between March 28, 1968, and the date upon which the Company equalizes wages in accordance with Paragraph 3 of this Order in which she received a salary from the Company for service as a cabin attendant, the difference between the salary actually paid to her (including base pay, foreign flying supplement, if any, and incentive pay if any) and the salary (base pay, and incentive pay if any) which would have been paid to her had she been compensated as a purser with longevity for pay purposes equal to her system seniority.

(b) If she received pension payments at any time between July 2, 1965, and the date upon which the Company equalizes wages in accordance with Paragraph 3 of this Order, the difference between the pension payments made to her and those which would have been made to her had they been computed on the basis of her having been classified and paid as a purser throughout the period of her employment as a cabin attendant.

(c) For each layover between March 28, 1968, and the date upon which the Company equalizes wages in accordance with Paragraph 3 of this Order, the difference between one-half the value of the double room actually provided to her and the value of a single room had it been provided to her.

(d) For each calendar quarter from March 1, 1970, until the date upon which the Company equalizes wages in accordance with Paragraph 3 of this Order, a uniform cleaning allowance in accordance with the following standards as to eligibility and amount:

(i) Eligibility: To be eligible for a uniform cleaning allowance in a particular calendar quarter, she must have been employed as a cabin attendant on the first day of that quarter and she must have been so employed for the last full calendar month preceding such first day of the quarter.

(ii) Amount: The amount of the uniform cleaning allowance in each quarter shall be \$13 prorated on the basis of the time on payroll as a cabin attendant employee in such quarter.

8. WEIGHT: NEGATIVE INJUNCTION—The Company shall not:

(a) Weigh female cabin attendants;

(b) Condition the employment of female cabin attendants upon their agreeing that they may be reprimanded, suspended (grounded) or terminated for failure to maintain a prescribed weight;

(c) Prescribe a weight scale to which female cabin attendants are required or expected to adhere;

(d) Reprimand, suspend (ground) or terminate any female cabin attendant because of her weight, unless her weight is such as to render her physically incapable of performing the duties of the job.

9. WEIGHT: AFFIRMATIVE INJUNCTION—The Company shall:

(a) Notify all female cabin attendants that it will no longer enforce any weight requirements other than that permitted by Paragraph 8(d) of this Order;

(b) Notify all female cabin attendants who signed

agreements conditioning their continued employment upon maintenance of a prescribed weight that such agreement will not be enforced;

(c) Remove from its Cabin Service Manual all materials relating to weight inconsistent with the prohibitions of Paragraph 8 of this Order.

(d) Offer immediate reinstatement, with system seniority intact, to each female cabin attendant terminated on account of weight on or after July 2, 1965;

(e) Immediately restore to flying status each female cabin attendant who is in suspended (grounded) status on account of weight on the date of this Order;

(f) Remove from each female cabin attendant's personnel files all records of warning reprimands, and/or discipline on account of weight; but preserve such records in a central location for so long as is necessary to compute backpay awarded under Paragraphs 10 and 11 of this Order.

10. WEIGHT: BACKPAY: TERMINATED EMPLOYEES—The Company shall pay to each Title VII plaintiff whose employment was terminated on account of her weight on or after July 2, 1965, backpay for the period between the date of said termination and the date reinstatement is offered in accordance with Paragraph 9(d) of this Order. The amount of backpay shall be the amount of wages she would have earned during said period (adjusted to the purser pay scale to the extent that the class of which she is a member is awarded backpay for work performed during said period), less the amount earned or earnable with reasonable diligence from other work during said period which would not have been performed had she not been terminated.

**11. WEIGHT: BACKPAY: SUSPENDED (GROUND-ED) EMPLOYEES**—The Company shall pay to each Title VII plaintiff who lost salary by reason of a suspension (grounding) on account of her weight on or after July 2, 1965, backpay for the period of said suspension (grounding). The amount of backpay shall be the amount of wages she would have earned during said period (adjusted to the purser pay scale to the extent that the class of which she is a member is awarded backpay for work performed during said period), less the amount she earned from other work during said period which would not have been performed had she not been suspended (grounded).

**12. EYEGLASSES: NEGATIVE INJUNCTION**—The Company shall not:

- (a) Forbid female cabin attendants to wear eyeglasses in flight;
- (b) Condition the employment of female cabin attendants upon their agreeing that they will not wear eyeglasses in flight.
- (c) Discriminate in hiring female cabin attendants on the basis of whether they wear eyeglasses and/or would wear eyeglasses in flight.

**13. EYEGLASSES: AFFIRMATIVE INJUNCTION**—The Company shall:

- (a) Notify all female cabin attendants that it will no longer enforce any rule prohibiting the wearing of eyeglasses in flight, and remove any contrary material from its Cabin Service Manual;
- (b) Notify all female cabin attendants who signed agreements conditioning their continued employment upon not

wearing eyeglasses in flight that such agreements will not be enforced.

**14. HEIGHT**—The Company shall not refuse to hire female cabin attendants because of their height, if they are not taller than the Company has considered acceptable in hiring male cabin attendants at any time on or after July 2, 1965.

**15. LUGGAGE: NEGATIVE INJUNCTION**—The Company shall not restrict its female cabin attendants' choice of luggage to be carried onto the plane, except that it may require that such luggage be in good condition and not of a size which would pose storage problems on the plane.

**16. CHAIN OF COMMAND**—The Company shall not establish a chain of command aboard flight which makes a female cabin attendant subordinate to a male cabin attendant with lesser system seniority, irrespective of their job titles, and the Company shall revise its existing chain of command to conform to this requirement.

**17. INJUNCTION AGAINST FUTURE DISCRIMINATION IN THE FILLING OF CABIN ATTENDANT POSITIONS**—The Company shall not discriminate on the basis of sex in the filling of cabin attendant positions irrespective of the title of the position and the job content thereof, unless sex constitutes a bona fide occupational qualification for the position within the meaning of 42 U.S.C. §2000e-2(e)(1), nor shall the Company perpetuate the effects of past discrimination by according a preference to pursers not warranted by system seniority in the filling of any cabin attendant position which may hereinafter be created.

18. **REMEDYING THE PRIOR DISCRIMINATION IN THE FILLING OF PURSER VACANCIES**—Counsel for the plaintiffs, counsel for the Company, and counsel for the Union shall meet promptly after the signing of this Order, together with such additional persons as each of them may designate, and shall discuss the following questions:

(a) Whether, in light of this Order, maintenance of a separate purser job classification, with a separate set of monthly schedules to be bid separately, is desired;

(b) If so:

(i) What procedure should be adopted to determine who properly belongs on the purser list, and with what relative placement thereon, in light of the Court's findings as to discrimination in the filling of purser positions; and

(ii) What changes must be made in the criteria for determining entitlement to future placement on said list, and treatment following said placement, in light of the Court's findings of discrimination with respect to said criteria and treatment.

Not later than 60 days after the date of this Order, counsel for the parties shall report to the Court any agreement they have reached on this matter and, in the absence of agreement, they shall report to the Court their respective positions and the arguments in support of their positions. Upon receipt of such reports, the Court shall determine the appropriate remedy for the prior discrimination in the filling of purser vacancies.

19. **INTEREST**—With respect to all monies to be paid under the foregoing provisions of this Order, the Company

shall pay six percent interest per annum from the date the violation occurred giving rise to said liability through the date upon which payment is made in accordance with this Order.

20. **MECHANICS FOR PAYMENT PURSUANT TO THIS ORDER**—Counsel for the plaintiffs and counsel for the Company shall meet promptly following the signing of this Order to establish procedures for determining the precise monetary amounts due to each employee pursuant to the provisions of this Order. All costs incurred in making said determinations shall be borne by the Company. The procedures adopted shall be such as to assure that payments shall be made as soon as possible, but in no event more than six months after this Order (unless the Court, for good cause shown, extends said deadline with respect to particular employees as to whom disputes have arisen concerning entitlement or computation). Any disputes as to entitlement or computation which cannot be resolved by agreement of counsel shall be referred to the Court for disposition.

21. **IMPLEMENTATION**—Counsel for the plaintiffs, counsel for the Company and counsel for the Union shall be responsible, for a period of two years following this Order, to take such steps as may be necessary to assure compliance with this Order, in accordance with the procedure described in this paragraph. Any complaint by any employee or by counsel for any party that the provisions of this Order have been violated shall be discussed initially by counsel. If they unanimously agree as to the correct disposition of a complaint, they may effectuate said disposition without the need for referring it to the Court, but shall maintain a written record of said complaint and disposition. If they do not unanimously agree as to the correct disposition of a com-

plaint any one of them may refer the matter to the Court for disposition. The Company shall pay all expenses incurred by counsel in performing the functions assigned to them in Paragraphs 20 and 21 of this Order, including the travel expenses of plaintiffs' attorneys and shall pay a reasonable attorney's fee to the plaintiffs' attorneys for their services therefor.

22. LITIGATION EXPENSES—The Company shall reimburse plaintiffs for all reasonable expenses incurred on their behalf in litigating this action. Counsel for plaintiffs and counsel for the Company shall attempt to agree upon the amount thereof. In the absence of such agreement, they shall on or before the 90th day following this Order report their respective positions to this Court and the Court shall thereupon determine the amount thereof.

23. ATTORNEY'S FEE—The Company shall pay a reasonable attorney's fee for plaintiffs' legal representation. Counsel for plaintiffs and counsel for the Company shall attempt to agree upon the amount thereof. In the absence of such agreement, they shall, on or before the 90th day following this Order, report their respective positions to the Court, and the Court shall thereupon determine the amount thereof.

24. RETAINED JURISDICTION—The Court hereby retains jurisdiction of this cause for the purpose of issuing any additional orders or decrees needed to effectuate, clarify, or enforce the full purpose and intent of this Order.

JUDGMENT SHALL BE ENTERED ACCORD-  
INGLY.

UNITED STATES DISTRICT JUDGE  
/s/ AUBREY E. ROBINSON, JR.

DATE: APRIL 3, 1974

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 74-1791

MARY P. LAFFEY, ET AL

v.

NORTHWEST AIRLINES, INC., APPELLANT  
AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

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No. 75-1334

MARY P. LAFFEY, ET AL., APPELLANTS

v.

NORTHWEST AIRLINES, INC.,  
AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

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Appeals from the United States District Court for the  
District of Columbia

(D.C. Civil Action No. 2111-70)

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Argued September 9, 1975

Decided October 20, 1976

Henry Halladay, with whom William E. Martin and John L. Richardson, were on the brief for appellant in No. 74-1791 and appellee in No. 75-1334.

Michael H. Gottesman, with whom Dennis D. Clark, Robert M. Weinberg and George H. Cohen, were on the brief for appellants in No. 75-1334 and appellees in No. 74-1791.

Linda Dorian, Attorney, Equal Employment Opportunity Commission of the bar of the District of Columbia Court of Appeals, *pro hac vice*, by special leave of court, with whom Beatrice Rosenberg and Charles L. Reischel, Attorneys, Equal Employment Opportunity Commission, were on the brief for Equal Employment Opportunity Commission as *amicus curiae*.

Robert S. Savelson and Donald P. Capuano, were on the brief for appellee Air Line Pilots Association. Glenn V. Whitaker also entered an appearance for appellee Air Line Pilots Association.

A. Andrew Giangreco and Samuel Borzilleri entered appearances for appellee Transportation Workers Union.

Before BAZELON, Chief Judge, and TAMM and ROBINSON, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROBINSON.

ROBINSON, Circuit Judge: Northwest Airlines (NWA) appeals from a judgment of the District Court<sup>1</sup> declaring certain of its personnel policies violative of the Equal Pay Act of 1963<sup>2</sup> and Title VII of the Civil Rights Act

<sup>1</sup> *Laffey v. Northwest Airlines*, 366 F.Supp. 763 (D.D.C. 1973); *Laffey v. Northwest Airlines*, 374 F.Supp. 1382 (D.D.C. 1974). See also *Laffey v. Northwest Airlines*, 392 F.Supp. 1076 (D.D.C. 1975), an adjudication not before us on this appeal.

<sup>2</sup> Pub. L. No. 88-38, § 3, 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1970). Hereinafter we cite this legislation and in most instances other legislation by reference only to the United States Code.

of 1964,<sup>3</sup> and granting injunctive and monetary relief. The principal practice in issue here is the payment to women employed as stewardesses of salaries lower than those paid to men serving as pursers for work found by the court to be substantially equal. Others are the provision to stewardesses of less desirable layover accommodations and allowances for maintenance of uniforms, and the imposition of weight restrictions upon stewardesses only. In varying respects and degrees NWA challenges findings of fact<sup>4</sup> and conclusions of law<sup>5</sup> on these matters, as well as the propriety of the remedial measures adopted.<sup>6</sup>

On careful review of the extensive record on appeal, we sustain the District Court's adjudications on all substantive questions of statutory infringement. We also uphold most but not all of the court's specifications on relief.<sup>7</sup> Thus we affirm the judgment in part, vacate it in part and remand the case to the District Court for further proceedings.

## I. HISTORY OF THE EMPLOYMENT PRACTICES

### A. Stewardess and Purser Positions

Between 1927 and 1947, all cabin attendants employed on NWA's aircraft were women, whom NWA classified

<sup>3</sup> Pub. L. No. 88-352, tit. VII, § 701 *et seq.*, 78 Stat. 253 (1964), as amended, 42 U.S.C. § 2000(e) *et seq.* (1970).

<sup>4</sup> See *Laffey v. Northwest Airlines*, *supra* note 1, 366 F. Supp. at 763-789.

<sup>5</sup> See *id.* at 789-790; *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

<sup>6</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1382-1390.

<sup>7</sup> Our discussion takes the following order: in Part I, the history of the employment practices in issue; in Part II, the applicable statutes; in Part III, the Equal Pay Act claims; in Part IV, the Title VII claims; in Part V, the remedial order; and in Part VI, the liability of the unions.

as "stewardesses." \* In 1947, when the company initiated international service, it established a new cabin-attendant position of "purser," \* and for two decades thereafter adhered to an undeviating practice of restricting purser jobs to men alone.<sup>10</sup> In implementation of this policy, NWA created another strictly all-male cabin-attendant classification—"flight service attendant"—to serve as a training and probationary position for future pursers.<sup>11</sup> NWA has maintained a combined seniority list for pursers and flight service attendants, on which seniority as pursers accrued to flight service attendants immediately upon assumption of their duties as such, and a separate seniority list for stewardesses.<sup>12</sup> From 1951 until 1967, flight service attendants had a contractual right to automatic promotion to purser vacancies in the order of their seniority.<sup>13</sup>

It was not until 1967, when a new collective bargaining agreement was negotiated, that stewardesses first became contractually eligible to apply for purser posi-

\* *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 765 (Find. 6).

\* *Id.*

<sup>10</sup> *Id.* This bar to access, found in violation of Title VII, *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 789 (Concl. 5), is not contested by NWA on appeal. The company challenges only the finding that the purser and stewardess jobs are intrinsically equal and thus commanding equal salaries even for those stewardesses who might not seek purser status.

<sup>11</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 765 (Find. 6).

<sup>12</sup> *Id.* at 766 (Find. 13).

<sup>13</sup> *Id.* at 766-767 (Find. 14). A small number of flight service attendants in order to maintain their base location in Hawaii chose not to become pursers.

tions.<sup>14</sup> During negotiations on the issue, NWA, for both the 1967 agreement and another in 1970, rejected an additional union proposal that stewardesses, like flight service attendants, be allowed to progress to purser slots according to seniority, stating that the company "prefers males and intends to have them."<sup>15</sup> The company has also insisted upon the right of "selectivity" in choosing which stewardesses might become pursers, and has imposed other restrictions on stewardesses seeking purser vacancies which had not previously been laid on flight service attendants.<sup>16</sup>

Company policy had been to fill purser openings by hiring "men off the street" and training them for a short time, after which notices of purser vacancies would be posted.<sup>17</sup> Following the 1967 collective bargaining agreement affording stewardesses access to these jobs, however, NWA hired five male purser-applicants with-

<sup>14</sup> *Id.* at 767-768 (Finds. 23, 24).

<sup>15</sup> *Id.* at 767-768, 778-779 (Finds. 23, 45).

<sup>16</sup> *Id.* at 767-769 (Finds. 23, 24). Stewardesses who bid unsuccessfully for purser positions are permitted a review of the company's action only if they have four years of service for the company "on flights to which a purser has been assigned." The probationary period for pursers has been extended from four to six months. Flight service attendants who become pursers are given credit for their entire service on the purser seniority list, while stewardesses who become pursers receive no seniority credit for their service as stewardess, and are required to go to the bottom of the purser seniority list. Because of an overlap at the upper end of the stewardess salary scale and the lower end of the purser salary scale, senior stewardesses who become pursers will not receive any greater pay as purser for a significant period of time. The District Court found that these requirements were a significant deterrent to stewardess-bidding for purser vacancies. *Id.* at 768-769 (Find. 24). This finding is not challenged by NWA on appeal.

<sup>17</sup> *Id.* at 769 (Find. 27).

out ever posting notices of the vacancies.<sup>19</sup> In 1970, after three years of ostensibly open admission to purser status, NWA had 137 male cabin attendants—all as pursers—and 1,747 female cabin attendants—all but one as stewardesses.<sup>19</sup>

The sole female purser at that time was Mary P. Laffey, who bid for a purser vacancy in 1967, after nine years' service as a stewardess.<sup>20</sup> Although that purser position was scheduled to be filled in November, 1967, processing of her application was delayed assertedly for the reason that NWA needed to administer new tests to purser applicants.<sup>21</sup> These tests had never previously been used in selecting pursers, and during the interim between Ms. Laffey's application and her appointment NWA hired two male pursers without benefit of any tests.<sup>22</sup> Finally, in June, 1968, Ms. Laffey became a purser, but was placed on the bottom rung of the purser-salary schedule and received less than her income as a senior stewardess.<sup>23</sup>

<sup>19</sup> *Id.* (Find. 28).

<sup>19</sup> *Id.* at 773 (Find. 38). These statistics changed significantly after suit was filed, when NWA began to diversify male-female ratios in different occupations. Some men were placed in the lower-paid categories by demoting pursers and by hiring new male applicants as "stewards"—who were paid at the stewardess rate. *Id.* at 767, 770-771 (Finds. 20, 35).

<sup>20</sup> *Id.* at 769-770 (Find. 29).

<sup>21</sup> *Id.* at 770 (Find. 30).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (Finds. 31, 33). A pay decrease for progression from stewardess to purser had been specifically prohibited by the 1967 collective bargaining agreement, which provided:

No reduction in pay shall be suffered by an employee by virtue of his accepting a purser assignment.

NWA eventually acquiesced and paid Ms. Laffey her stewardess salary rate. *Id.* (Find. 33).

## B. Stewardess and Purser Duties

On this appeal, NWA does not challenge holdings by the District Court that Title VII was violated by NWA's refusal to hire female pursers.<sup>24</sup> Rather, the appeal

<sup>24</sup> NWA does not contest the conclusions following:

3. Northwest Airlines, Inc. has discriminated on the basis of sex in willful violation of the Equal Pay Act, 29 U.S.C. § 206(d)(1), 29 U.S.C. § 255(a), by paying Mary P. Laffey a lower salary as a purser than it pays to male pursers with equivalent length of cabin attendant service. . . .

5. Northwest Airlines, Inc. has violated Title VII:

(a) By discriminating against females because of their sex in filling purser vacancies from July 2, 1965 to date.

(b) By providing from June 16, 1967 to date that stewardesses who become pursers do not get credit for their stewardess seniority on the purser seniority list, where as male FSA's who have become pursers (both before and after June 15, 1967), get credit for FSA seniority on the purser list. . . .

\* \* \*

(d) By providing that stewardesses who become pursers are slotted at the bottom of the purser pay scale and thus receive lower salaries than male pursers with equal cabin attendant longevity, thus perpetuating the effects of past discrimination from June 15, 1967 to date.

(e) By changing its procedures and standards for selecting pursers, lengthening the probationary period, denying consideration of purser bids to stewardesses who have not flown with a purser for four years, according automatic preference to junior pursers over senior stewardesses in bidding for purser vacancies, discouraging and attempting to deter stewardesses from bidding on purser vacancies, failing to post notices of all purser vacancies at all cabin attendants bases, from June 15, 1967 to date.

[Continued]

focuses primarily on whether the payment of unequal salaries to stewardesses and pursers, while occupying positions as such, implicates Title VII and the Equal Pay Act. The purser wage scale ranges from 20 to 55 percent higher than salaries paid to stewardesses of equivalent seniority.<sup>25</sup> The Equal Pay Act<sup>26</sup> forbids this pay differential unless greater skill, effort or responsibility is required to perform purser duties.<sup>27</sup> Title VII<sup>28</sup> likewise proscribes inferior sex-based compensation plans for women and, additionally, extends its protection to ban conditions of employment imposed discriminatorily upon women employees.<sup>29</sup>

<sup>25</sup> [Continued]

(f) By demoting Mary P. Laffey from purser to stewardess and continuing her as a stewardess, by paying her a lower salary as a purser than it paid male pursers hired as cabin attendants subsequent to her, thus perpetuating the effects of past discrimination.

(g) By imposing a "chain of command" aboard planes under which all male cabin attendants, irrespective of classification or length of service were superior to all female cabin attendants.

(h) By forbidding only female cabin attendants to wear eyeglasses, . . . , to have free choice of luggage, . . . and by imposing a shorter maximum height requirement for female cabin attendants.

*Id.* at 789-790 (Concls. 3, 5).

<sup>25</sup> *Id.* at 788 (Find. 80).

<sup>26</sup> The relevant portion thereof is quoted at text *infra* at note 90.

<sup>27</sup> We discuss this prohibition, and exceptions thereto, in Part III, *infra*.

<sup>28</sup> The relevant portion thereof is quoted at text *infra* at note 91.

<sup>29</sup> Discussed in Part IV *infra*.

### —(1) *Flight Assignments*

In gauging whether NWA's pursers and stewardesses performed equal work, the District Court analyzed in great detail NWA's flight operations and its usage of the three different categories of cabin attendants. NWA flies diverse itineraries, which affect the type of personnel assigned to the flight, and which are categorized by particular terminology. In brief, "pure domestic commercial flights" are regularly-scheduled commercial flights which begin and end in the United States, and do not continue to the Orient.<sup>30</sup> Other commercial flights originate in one city in the United States, fly to an intermediate destination in the United States, and then on to the Orient; and the intra-United States portions of such trips are known as "domestic segments of international flights".<sup>31</sup> "Transpacific commercial flights" are regularly-scheduled flights between Anchorage, Seattle, Honolulu and Tokyo; while "commercial interport flights" are regularly scheduled flights between Tokyo and other Asian cities.<sup>32</sup> "Military air charters" are flights contracted with the United States Government to provide regularly-scheduled military air charter service.<sup>33</sup>

Pure domestic commercial flights are, with some exceptions,<sup>34</sup> served exclusively by stewardesses and flight service attendants.<sup>35</sup> Pursers are ordinarily utilized on interport flights, transpacific commercial flights, domestic

<sup>30</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 775-776 (Find. 40).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> At times, NWA has chosen to utilize pursers on domestic flights. *Id.* at 775-778 (Finds. 40, 41).

<sup>35</sup> *Id.* at 776-778 (Find. 41).

segments of international flights, and on all types of charters, military or otherwise, including pure domestic flights.<sup>36</sup> Since 1967, the company has also maintained a crew of stewardesses with proficiency in one or more foreign languages, who are assigned to certain international flights.<sup>37</sup>

NWA schedules a different cabin-attendant crew on each flight segment; one crew will fly the domestic segment, another will take over for the transpacific link, and still a third is used on the interport portion.<sup>38</sup> Purser and stewardesses bid separately, according to seniority, for monthly schedules.<sup>39</sup>

#### —(2) *Overall Evaluation*

Probing beneath the different titles, bidding schedules and salaries, the District Court made extensive factual findings comparing the work actually done by pursers and stewardesses, and held it to be essentially equal when considered as a whole.<sup>40</sup> For example, pursers are assigned to the first-class section of the aircraft, which has a smaller passenger load per cabin attendant and a correspondingly more leisurely work pace as compared with the chores inherited by stewardesses assigned to the tourist-class section.<sup>41</sup> The hourly work load also tends to be greater on the “short hop” domestic schedules than on the longer international flights.<sup>42</sup>

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 778 (Find. 44).

<sup>38</sup> *Id.* at 778 (Find. 42).

<sup>39</sup> *Id.* (Finds. 42, 43).

<sup>40</sup> *Id.* at 775-778 (Finds. 40-78).

<sup>41</sup> *Id.* at 779 (Finds. 49, 50).

<sup>42</sup> *Id.* (Find. 50).

Duties performed do not differ significantly in nature as between pursers and stewardesses. All must check cabins before departure, greet and seat passengers, prepare for take-off, and provide in-flight food, beverage and general services.<sup>43</sup> All must complete required documentation, maintain cabin cleanliness, see that passengers comply with regulations and deplane passengers.<sup>44</sup> The premier responsibility of any cabin attendant is to insure the safety of passengers during an emergency, and cabin attendants all must possess a thorough knowledge of emergency equipment and procedures on all aircraft.<sup>45</sup> All attendants also must be knowledgeable in first aid techniques and must be able to handle the myriad of medical problems that arise in flight.<sup>46</sup> Food service varies greatly between flights, but pursers engage in no duties that are not also performed on the same or another flight by stewardesses.<sup>47</sup> Another important duty—building goodwill between NWA and its passengers—depends on the poise, tact, friendliness, good judgment and adaptability of every cabin attendant, male or female.<sup>48</sup>

#### —(3) *Domestic and International Flights*

The District Court found that when pursers are scheduled on pure domestic flights, their duties are identical to those of stewardesses functioning as “senior cabin attendants”—the most senior purser, or the most senior stewardess on flights with no purser.<sup>49</sup> A substantial per-

<sup>43</sup> *Id.* at 779-780 (Find. 51).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 780 (Find. 52).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 781 (Find. 57).

<sup>48</sup> *Id.* (Find. 53).

<sup>49</sup> *Id.* at 786-787 (Find. 71).

centage of NWA's overall utilization of pursers is on pure domestic flights and domestic segments of international flights.<sup>50</sup> Similarly, a substantial percentage of the company's use of pursers is their assignment to military air charter flights.<sup>51</sup> Many pursers fly flights of these types exclusively for months or years at a time.<sup>52</sup>

Although, as NWA argues, after January, 1971, pursers as a group have spent more nights away from home than do stewardesses, the District Court found that these longer trips "do not constitute substantially dissimilar working conditions from those of other cabin attendants":<sup>53</sup>

More consecutive days away from home also means more consecutive days at home during the month. The preferences of cabin attendants in this regard are highly subjective—some prefer one long trip a month, while others prefer shorter trips; . . . . Because ground time is not counted toward flight time, purser schedules (encompassing longer flights) entail fewer actual hours of work. . . .<sup>54</sup>

#### —(4) Documentation Tasks

With respect to documentation responsibilities, the District Court found that pursers and stewardesses have different, but comparable, duties.<sup>55</sup> Stewardesses alone sell liquor, and are alone required to complete inventory

<sup>50</sup> *Id.* at 787 (Find. 73).

<sup>51</sup> *Id.* On military air charter flights, all phases of work done by pursers is less demanding than on other flights. There is no class-service, no liquor, and only very simple food service.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 787-788 (Find. 75).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 781-785 (Finds. 58-64).

and sales records, and beverage usage reports.<sup>56</sup> On flights carrying tax-free liquor, customs inventory forms must be completed both by stewardesses and pursers,<sup>57</sup> and all cabin attendants are subject to discipline for error.<sup>58</sup> On all flights, the senior cabin attendant and the senior in tourist—the senior stewardess in the tourist class—must make appropriate entries in the log book,<sup>59</sup> and also prepare an in-flight-service report, seating charts, accident reports and other diverse documents.<sup>60</sup>

Pursers are responsible for administering international quarantine procedures for passengers, crew and cargo.<sup>61</sup> As the requirements vary from port to port, pursers must keep their knowledge current in order to comply with

<sup>56</sup> *Id.* at 781 (Find. 58). Liquor is provided free of charge in the first-class compartment, where the pursers work. Hence pursers must only complete a beverage-use form.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> The log contains a listing of cabin items in need of repair.

<sup>60</sup> See the listing in *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 781-782 (Find. 59). There are also various other forms which the senior cabin attendant is required to complete. For example, on flights from mainland United States to Hawaii, the senior cabin attendant, who almost always is a stewardess, must instruct passengers in the completion of an agricultural declaration form, spray the cabin with insecticides and record this information on a "certificate of disinsectization". Only stewardesses and flight service attendants have been regularly scheduled on these flights. On flights between the United States and Winnipeg, stewardesses must oversee completion of Canadian and United States customs forms. The senior cabin attendant also has direct personal responsibility for the safe transfer of passage aliens who transit through the United States without visas, under permission from the Immigration Service—the so-called "TRWOV" passengers. *Id.* at 782 (Find. 60).

<sup>61</sup> *Id.* at 783 (Find. 61).

applicable regulations.<sup>62</sup> These duties, however, are not required on all flights to which pursers are assigned, such as on pure domestic flights on which pursers perform no documentation duties, and on certain domestic segments on which such purser duties are minimal.<sup>63</sup> To boot, pursers are instructed to carry out their international documentation responsibilities at times when no significant passenger service is required, and other cabin attendants perform all other necessary services during those times.<sup>64</sup> The District Court found that "the documentary duties described which are . . . assigned only to pursers involved no greater skill, effort or responsibility than the stewardess job."<sup>65</sup>

—(5) *Stewardess and Purser Responsibilities*

The District Court also examined another general, more intangible, duty advanced by NWA as a factor rendering the purser job different in kind from the stewardess position. The company's cabin service manual states that the senior purser on a flight will always be considered the senior cabin attendant and as such must coordinate the activities of the other attendants, and is to be held "responsible and accountable" for the proper rendering of service on that flight.<sup>66</sup> But the manual further provides that if no purser is scheduled, the most senior stewardess

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 784 (Find. 62). On east-bound segments of domestic flights, pursers need only transport the pouch containing the documents and deliver it to another company transportation agent upon arrival at the aircraft's destination. On west-bound portions of domestic segments of flights from the United States to Tokyo and on interport flights, the documentation duties are more substantial.

<sup>64</sup> *Id.* at 784-785 (Find. 63).

<sup>65</sup> *Id.* at 785 (Find. 64).

<sup>66</sup> *Id.* (Finds. 65-66).

will serve as senior flight attendant and will similarly be charged with coordination of cabin service, although she is accountable only for the conduct of service in the section of the aircraft in which she works, responsibility for the remainder being placed on the senior attendant in the other section of the aircraft.<sup>67</sup>

Senior cabin attendants, be they purser or stewardess, have a number of supervisory duties. These include monitoring and, where necessary, correcting the work of other cabin attendants; determining the times of meals and movie showings; shifting cabin attendants from section to section to balance workloads; and giving pre-departure briefings on emergency equipment and procedures.<sup>68</sup> On large planes, even if a purser in the first-class section is designated the senior cabin attendant, the senior in tourist shoulders these same burdens in her section of the aircraft—overseeing the great majority of passengers and cabin attendants.<sup>69</sup> Stewardesses and pursers alike are subject to disciplinary action if they fail to carry out their "supervisory responsibilities."<sup>70</sup>

There is, however, no merit system maintained to reward those who "supervise" better than others; all pursers and all stewardesses are on uniform, separate wage scales, regardless of whether—or how well—an individual performs.<sup>71</sup>

NWA asserts that it hired, trained and promoted male pursers in the belief that they would exercise leadership and be "responsible and accountable for the entire cabin

<sup>67</sup> *Id.* (Find. 66).

<sup>68</sup> *Id.* at 785-786 (Find. 67).

<sup>69</sup> *Id.* at 786 (Find. 68).

<sup>70</sup> *Id.* at 785-786 (Find. 67).

<sup>71</sup> *Id.*

service staff," whereas stewardesses functioning as senior cabin attendants on particular flights would be responsible for coordination of cabin service on the entire flight but would be "accountable" only for the manner of service in their assigned sections of the aircraft.<sup>72</sup> The District Court found that, in practice, this distinction between levels of responsibility and accountability is illusory:

Only in the purser's formal relationship with the Company does his accountability differ from the non-purser senior cabin attendant and that difference is derived from status rather than as a function of the job. . . .<sup>73</sup>

The court found, moreover, that the senior cabin attendant's duties are not substantially greater than the ordinary cabin attendant's function:

. . . Cabin service attendants are employed to serve and protect Company passengers. The "Supervisory" functions of senior cabin attendants—whether purser or stewardess—are less important than, and require no greater skill, effort or responsibility, than the other functions assigned to all cabin attendants."<sup>74</sup>

### C. The District Court's Conclusions

Careful evaluation of the facts comprehensively found led the District Court to conclude that NWA had discriminated against women cabin attendants on the basis of sex, in violation of Title VII and the Equal Pay Act, by compensating stewardesses and pursers unequally for equal work on "jobs the performance of which requires equal skill, effort and responsibility and which are per-

<sup>72</sup> *Id.* at 786 (Find. 69).

<sup>73</sup> *Id.* NWA has consistently refused to pay stewardesses acting as senior cabin attendants any supplement for their services. *Id.* (Find. 70).

<sup>74</sup> *Id.* (Find. 69).

formed under similar working conditions."<sup>75</sup> More specifically, the court found that NWA had discriminated in "willfull violation"<sup>76</sup> of the Equal Pay Act<sup>77</sup> (a) by paying female stewardesses lower salaries and pensions than male pursers; (b) by providing female cabin attendants less expensive and less desirable layover accommodations than male cabin attendants; (c) by providing to male but not to female cabin attendants a uniform-cleaning allowance; and (d) "by paying Mary P. Laffey a lower salary as a purser than it pays to male pursers with equivalent length of cabin attendant service."<sup>78</sup> All of these same actions were held by the District Court also to be violations of Title VII<sup>79</sup> and the court further held that Title VII violations arose out of other forms of company discrimination, *inter alia*, (a) in filling purser vacancies; (b) in denying to stewardesses who became pursers the same seniority rights and pay given male flight service attendants similarly promoted; (c) in changing procedural requirements for becoming a purser so as to deter female applicants, even after the 1967 agreement;<sup>80</sup> (d) in erecting a "chain of command" on flights under which all male cabin attendants, regardless of seniority or classification, were superior to all females; and (e) in imposing on women alone a ban on eyeglasses, prescribed luggage, and weight and height restrictions.<sup>81</sup>

<sup>75</sup> *Id.* at 789 (Concls. 2, 4).

<sup>76</sup> *Id.* (Concl. 2).

<sup>77</sup> 29 U.S.C. § 206(d)(1), 29 U.S.C. § 255(a).

<sup>78</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 789 (Concls. 2, 3). Conclusion of Law No. 3, referring specifically to Ms. Laffey, was not appealed by NWA. See note 24 *supra*.

<sup>79</sup> 42 U.S.C. § 2000(e)-2(a).

<sup>80</sup> See text *supra* at note 14.

<sup>81</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 780-790 (Concl. 5). Many of these are not challenged by NWA on appeal.

On this appeal, NWA challenges the District Court's central ruling that disparate compensation for equal work violates Title VII additionally to the Equal Pay Act.<sup>82</sup> It attacks also the court's holding that stewardesses and pursers are entitled to equal pay,<sup>83</sup> and the corollary finding that stewardesses who became pursers were improperly denied credit for their stewardess seniority on the purser seniority list.<sup>84</sup> The company also disputes the court's conclusion that Title VII was violated by its policies regarding cleaning allowances and layover accommodations.<sup>85</sup> Lastly, it objects to the remedial measure adopted by the court to cure the conceded violation as to weight restrictions.<sup>86</sup> These contentions, in turn, we now examine.

## II. THE APPLICABLE STATUTES

By the Equal Pay Act, adopted in 1963 as an addition<sup>87</sup> to the Fair Labor Standards Act of 1938,<sup>88</sup> Congress ordained:

No employer having employees subject to any provisions of this section<sup>89</sup> shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . .

<sup>82</sup> See Parts III, IV *infra*.

<sup>83</sup> See Parts III, IV *infra*.

<sup>84</sup> See Parts III, IV *infra*.

<sup>85</sup> See Part IV *infra*.

<sup>86</sup> See Part V *infra*.

<sup>87</sup> Pub. L. No. 88-38, § 3, 77 Stat. 56 (1963).

<sup>88</sup> Act of June 25, 1938, ch. 676, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 *et seq.* (1970).

<sup>89</sup> NWA employees are unquestionably within the coverage of the Equal Pay Act.

for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .<sup>90</sup>

By Title VII, Congress has also decreed, with exceptions not immediately relevant, that

[i]t shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>91</sup>

It is by these standards that objections to the substantive features of the District Court's judgment are to be gauged on this appeal.

### A. *Interrelationship of the Statutes*

NWA argues that the two statutes, read in *pari materia*, do not authorize monetary relief premised upon both legislative schemes for the same act of paying disparate

<sup>90</sup> 29 U.S.C. § 206(d)(1) (1970).

<sup>91</sup> 42 U.S.C. § 2000e-2(a)(1).

wages. It is said that while the Equal Pay Act permits a statutory class action to secure equal pay for equal work by employees of different sexes,<sup>92</sup> Title VII's guaranty of nondiscriminatory "compensation" applies only to such minority groups as are not covered by the Equal Pay Act.

NWA further contends that the District Court was inconsistent in finding transgressions of both statutes. The argument in this connection may be summarized briefly. If the purser and stewardess jobs are "equal," and thus support the court's holding of an Equal Pay Act violation, the company's refusal to permit women to become pursers does not deprive them of advancement opportunities—because the jobs are equal—and thus there can be no encroachment upon Title VII. Conversely, if the purser job is superior, there is no infringement of the Equal Pay Act although access to that position has unlawfully been denied to women under Title VII. NWA does not challenge the court's finding that Title VII was dishonored by the exclusion of female employees from the purser position, but the company does contest the conclusion that the comparability of that position and the stewardess position brings the salary differential between pursers and stewardesses into collision with the Equal Pay Act.

We reject these approaches. The District Court's finding that NWA's purser and stewardess jobs are essentially equal in duties and responsibilities is not logically inconsistent with the court's conclusions that NWA impinged on Title VII by blocking the entry of women into the purser category. Although, as the District Court determined, the two jobs require equal "skill, effort, and responsibility" so as to command equivalent salaries under the Equal Pay Act, any statutorily-unexempted sex-based barrier to obtaining a particular job is forbidden by Title VII. Among the options withheld by Title VII from an

<sup>92</sup> See 29 U.S.C. § 216(b) (1970).

employer are those which "limit . . . or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex. . . ." <sup>93</sup> Notwithstanding, NWA classified its cabin attendants more prominently as all-female stewardesses and all-male pursers, and barred women applicants from the ranks of the latter though capable through existing employment and accrued experience with NWA to meet all of its purser-criteria save sex. That plainly was outlawed by Title VII as a sex-founded deprivation of employment opportunities, not the least of which were the superior emoluments which NWA bestowed on the purser position.<sup>94</sup>

Nor do we doubt that the same set of facts may form the basis for redress under both Title VII and the Equal Pay Act if the requirements of each are separately satisfied and the claimant does not reap overlapping relief for the same wrong. Unless foreclosed by the statutory language or history, nothing to rob aggrieved parties of the freedom to select among multiple remedies for separate though concurrent statutory violations is apparent.

Title VII rights are independent of the rights created by other statutes, and where remedies coincide the claimant should be allowed to utilize whichever avenue of relief is desired.<sup>95</sup> This would seem to be the clearer for claimants under Title VII which, as the Supreme Court held in *Alexander v. Gardner-Denver*,<sup>96</sup> was intended to

<sup>93</sup> See text *supra* at note 91.

<sup>94</sup> See Part I *supra*.

<sup>95</sup> See generally, Herbert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. Rev. 449 (1971).

<sup>96</sup> 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).

"supplement, rather than supplant existing laws . . . relating to employment."<sup>97</sup> The Court has also noted that the legislative history of Title VII "manifests a congressional intent to allow an individual to pursue independently his rights under Title VII and other applicable state and federal statutes."<sup>98</sup> During the pre-enactment debates, Congress rejected a proposed amendment which would have made Title VII the exclusive remedy for the unlawful employment practices it covers, and thereby evinced a congressional purpose to leave open other modes of relief available to victims of discriminatory employment practices.<sup>99</sup>

Although Title VII reaches farther than the Equal Pay Act to protect groups other than those sex-based classes and to proscribe discrimination in many facets of employment additional to compensation, nowhere have we encountered an indication that Title VII was intended either to supplant or be supplanted by the Equal Pay Act in the relatively small area in which the two are congruent. On the contrary, we are satisfied that the provisions of both acts should be read in *pari materia*, and neither should be interpreted in a manner that would undermine the other.<sup>100</sup> In *Orr v. Frank R. MacNeill & Son, Inc.*,<sup>101</sup> the Fifth Circuit declared that "[t]he sex discrimination provision of Title VII of the Civil Rights

<sup>97</sup> *Id.* at 49, 94 S.Ct. at 1020, 39 L.Ed.2d at 158-159.

<sup>98</sup> *Id.* at 48, 94 S.Ct. at 1019-1020, 39 L.Ed.2d at 158.

<sup>99</sup> See 110 Cong.Rec. 13650-13652.

<sup>100</sup> *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64 (1970). See also *Ammons v. Zia Co.*, 448 F.2d 117, 119 (9th Cir. 1971) ("both [the Civil Rights Act and the Equal Pay Act] 'serve the same fundamental purpose' . . ."); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 727 (5th Cir. 1970).

<sup>101</sup> 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 125, 46 L.Ed.2d 94 (1975).

Act of 1964 must be construed in harmony with the Equal Pay Act of 1963."<sup>102</sup> We agree, and we now so hold.

Moreover, the language of Title VII itself explicitly declares that it is unlawful for an employer to offer an employee discriminatory "compensation . . . because of such individual's . . . sex."<sup>103</sup> the legislative history of Title VII yields no hint that the guaranty of nondiscriminatory compensation was extended only to minority groups not embraced within the Equal Pay Act. Indeed, Title VII refers specifically to the Equal Pay Act and states that a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act.<sup>104</sup> This, then, focusses our inquiry once again upon whether the District Court correctly found that the employee-litigants had overcome the factors urged by NWA as proof that the stewardess and purser jobs were unequal, or whether NWA had sustained an affirmative defense under one of the Equal Pay Act's exceptions permitting limited instances of disparate pay for equal work.

<sup>102</sup> *Id.* at 170-171. See also *Piva v. Xerox Corp.*, 376 F.Supp. 242, 246-247 (N.D. Cal. 1974).

<sup>103</sup> See text *supra* at note 91.

<sup>104</sup> 42 U.S.C. § 2000e-2(h) (1970) specifies that .

. . . it shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

The exceptions to the Equal Pay Act, by virtue of which unequal salaries may be legally permissible are explicitly set forth in the statute, 29 U.S.C. § 206(d)(i)-(iv) (1970). See text *supra* at note 90.

## B. *The Union and the Statutes*

We must pause further to consider a recurrent theme in NWA's attack on the District Court's findings that particular company practices are discriminatory. NWA contends that union negotiations during the discriminatory era when the practices went unchallenged should be considered compelling evidence of an understanding that the stewardess and purser positions were dissimilar and that pursers accordingly deserved higher pay. The Company implies, in essence, that complaining employees should now be estopped from challenging these practices because their union—in which women are dominant—agreed to the wages and conditions of employment now impugned. We are not impressed by this argument.

The judicial function called into play here is not to assess the union's assumptions, but to determine whether the jobs in question were actually equal within the contemplation of the Equal Pay Act.<sup>103</sup> The evidentiary worth of the union's actions as a reflection of its own underlying evaluation of the characteristics of the two jobs is exceedingly weak. Beyond that, the union's agreement to negotiated terms is hardly evidence of an individual member's appraisal of the skills, efforts, and responsibilities essential to performance of the jobs. Particularly is this so where, as here, the union was bound to represent pursers as well as stewardesses,<sup>104</sup> and took on that responsibility at a time when earlier company policy had already created a *status quo* under which pursers were more highly paid than stewardesses. Since the union's obligation thenceforth was to seek pay raises

<sup>103</sup> Cf. *Hodgson v. Brookhaven Gen. Hosp.*, *supra* note 100, 436 F.2d at 724. See also *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 288 (4th Cir. 1974), *cert. denied*, 420 U.S. 972, 95 S.Ct. 1392, 43 L.Ed.2d 652 (1975).

<sup>104</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 765 (Find. 7).

benefiting all its members, it obviously was not in a position to alter substantially the position of one constituent group at the expense of another.<sup>107</sup> And when the union did attempt to win better treatment for stewardesses, it encountered stiff resistance from NWA.<sup>108</sup> The only logical inference from this combination of circumstances is that as a matter of strategy—not attributable to any belief as to the comparability of the two jobs—the union chose to forego a special demand for equality for the stewardesses in order to achieve more pressing bargaining objectives.

More fundamentally, union activity cannot strip individual employees of the opportunity to seek vindication of their statutory entitlements in court. Rights established under Title VII and the Equal Pay Act are “not rights which can be bargained away—either by a union, by an employer, or by both acting in concert.”<sup>109</sup> It cannot be gainsaid that NWA played an instrumental role in the negotiations leading to adoption of the discriminatory wage scales,<sup>110</sup> and a collective bargaining agreement perpetuating prior pay discrimination affords the employer no defense to a charge under the Equal Pay Act.<sup>111</sup>

<sup>107</sup> *Id.* at 767-768 (Find. 23).

<sup>108</sup> *Id.* at 778-779 (Find. 45).

<sup>109</sup> *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799, 21 A.L.R. Fed. 453 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). See also *United States v. Bethlehem Steel Corp.*, 312 F.Supp. 977, 989-991 (W.D.N.Y. 1970), *rev'd in part on other grounds*, 446 F.2d 652 (2d Cir. 1971).

<sup>110</sup> See text *supra* at note 108.

<sup>111</sup> In *Corning Glass Works v. Brennan*, 417 U.S. 188, 208-210, 94 S.Ct. 2223, 2234-2235, 41 L.Ed.2d 1, 17-18 (1974), the Supreme Court rejected the company's contention that it cured its violation of the Act—caused by paying different wages to day and night inspectors, a masking of a wage system originally based on sex—when a new collective bargaining agree-

We hardly need to mention that if the union also contributed to the discriminatory scheme, the claimant has a cause of action against the union as well.<sup>112</sup>

### III. THE EQUAL PAY ACT CLAIMS

As the Third Circuit has said, the Equal Pay Act

was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.<sup>113</sup>

ment went into effect. The new agreement provided for equalization of base wages for newly-hired night and day inspectors but continued to provide unequal base wages for employees hired before its operative date. The Court reasoned that the lower base wage for day inspectors was a "direct product" of the unlawful failure to equalize base wages for male and female employees as of the effective date of the Act. If the company had properly equalized the wage rates on that date, employees hired prior to the new agreement would have received the higher rate. Since the collective bargaining agreement "operated to perpetuate the effect of the company's prior illegal practice of paying women less than men for equal work," it provided no defense to infringement of the Act. 417 U.S. at 209-210, 94 S.Ct. at 2235, 41 L.Ed.2d at 18.

<sup>112</sup> See *Macklin v. Spector Freight Sys., Inc.*, 156 U.S.App. D.C. 69, 78-79, 478 F.2d 979, 988-989 (1973), *disapproved on other grounds*, *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); *Hodgson v. Sagner, Inc.*, 326 F.Supp. 371 (D. Md. 1971), *aff'd*, 462 F.2d 180 (4th Cir. 1972).

Under the Fair Labor Standards Act, no agreement between a company and a union, even if arrived at as a result of collective bargaining negotiations, can be used as a defense by a company to the statutory requirements.

*Hodgson v. Sagner, Inc.*, *supra*, 326 F.Supp. at 375.

<sup>113</sup> *Shultz v. Wheaton Glass Co.*, *supra* note 100, 421 F.2d at 265.

And as the Supreme Court has declared,

Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and *endemic* problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages." *Ibid.*<sup>114</sup>

#### A. The Guiding Principles

An Equal Pay Act claimant must show that her salary was lower than that paid by the employer to "employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."<sup>115</sup> The claimant bears the onus of demonstrating that the work unequally recompensed was "equal" within the meaning of the Act.<sup>116</sup> Once this has been done, the claimant will prevail unless the employer asserts as an affirmative defense that the wage differen-

<sup>114</sup> *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 195, 94 S.Ct. at 2228, 41 L.Ed.2d at 10 (emphasis added).

<sup>115</sup> See text *supra* at note 90.

<sup>116</sup> See 109 Cong. Rec. 9196 (1963) (remarks of Representative Frelinghuysen); 109 Cong. Rec. 9208 (remarks of Representative Goodell); *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 195, 94 S.Ct. at 2228, 41 L.Ed.2d at 10; *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972); *Hodgson v. Brookhaven Gen. Hosp.*, *supra* note 100, 436 F.2d at 722; *Shultz v. American Can Co.-Dixie Prods.*, 424 F.2d 356, 360 (8th Cir. 1970).

tial is justified under one of the four exceptions enumerated in the Act—“(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”<sup>117</sup> If one or more of these defenses is invoked, the employer bears the burden of proving that his policies fall within an exempted area.<sup>118</sup> This interpretation of the procedural mechanics of the Equal Pay Act comports with the construction of other provisions of the Fair Labor Standards Act, of which the Equal Pay Act is a part, by which statutory exceptions and exemptions are considered matters of affirmative defense to be proven by the employer.<sup>119</sup>

One of the more frequent controversies aroused by the Equal Pay Act has involved litigants' attempts to demonstrate that jobs with different titles and descriptions are in reality equal in their calls upon the jobholders. The contest often necessitates an assessment of the significance of differences in job demands advanced by the

<sup>117</sup> See text *supra* at note 90.

<sup>118</sup> *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 196, 94 S.Ct. at 2229, 41 L.Ed.2d at 11; *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 596 (3d Cir.), *cert. denied*, 414 U.S. 866, 94 S.Ct. 50, 38 L.Ed.2d 85 (1973); *Shultz v. Wheaton Glass Co.*, *supra* note 100, 421 F.2d at 266; *Shultz v. First Victoria Nat'l Bank*, 420 F.2d 648, 654 n.8, 7 A.L.R. Fed. 691 (6th Cir. 1969); *Shultz v. American Can Co.-Dixie Prods.*, *supra* note 116, 424 F.2d at 362.

<sup>119</sup> See *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095, 1098-1099 (1945); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393, 396-397 (1960); *Walling v. General Indus. Co.*, 330 U.S. 545, 547-548, 67 S.Ct. 883-884, 91 L.Ed. 1088, 1090-1091 (1947); *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295, 79 S.Ct. 756, 759, 3 L.Ed.2d. 815, 819 (1959), all cited in *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 197 n.12, 94 S.Ct. at 2229 n.12, 41 L.Ed.2d. at 11 n.12.

employer to show that the jobs are not equal. For “[it] is now well settled that the jobs need not be identical in every respect before the Equal Pay Act is applicable”;<sup>120</sup> the phrase “equal work” does not mean that the jobs must be identical, but merely that they must be “substantially equal.”<sup>121</sup> A wage differential is justified only if it compensates for an appreciable variation in skill, effort or responsibility between otherwise comparable job work activities.<sup>122</sup>

The Department of Labor has promulgated an extensive series of regulations<sup>123</sup> to guide the “application of the equal pay standard, [which] is not dependent on job classifications or titles but depends rather on actual job requirements and performance. . . .”<sup>124</sup> One regulation states:

Congress did not intend that inconsequential differences in job content would be a valid excuse for payment of a lower wage to an employee of one sex than to an employee of the opposite sex if the two are performing equal work on essentially the same job in the same establishment.<sup>125</sup>

<sup>120</sup> *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 203 n.24, 94 S.Ct. at 2232 n.24, 41 L.Ed.2d at 15 n.12.

<sup>121</sup> See, e.g., *Hodgson v. Fairmont Supply Co.*, *supra* note 116, 454 F.2d at 493, citing *Shultz v. Wheaton Glass Co.*, *supra* note 100, 421 F.2d at 265; *Hodgson v. American Bank of Commerce*, 447 F.2d 416 (5th Cir. 1971).

<sup>122</sup> See *Brennan v. Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 285.

<sup>123</sup> 29 C.F.R. §§ 800.114-800.166 (1975).

<sup>124</sup> 29 C.F.R. § 800.121 (1975).

<sup>125</sup> 29 C.F.R. § 800.120 (1975). See 109 Cong. Rec. 9196 (1963) (remarks of Representative Frelinghuysen); *id.* at 9208 (remarks of Representative Goodell); *id.* at 9761 (remarks of Senator McNamara).

Another points out that "[I]nsubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable."<sup>126</sup>

These regulations are entitled to "great deference" by the courts in applying the Equal Pay Act to given factual situations.<sup>127</sup> Courts have consistently held that differences in the duties respectively assigned male and female employees must be "evaluated as part of the entire job."<sup>128</sup> Thus, if in the aggregate the jobs require substantially similar skills, efforts and responsibilities, the work will be adjudged equal despite minor variations.<sup>129</sup>

When there is a disparity between salaries paid men and women for similar positions bearing different titles—such as pursers and stewardesses—the courts have scrutinized the evidence to discern whether the salary differential is justified by heterogeneous duties.<sup>130</sup> Another regulation of the Department of Labor states in relevant part,

<sup>126</sup> 29 C.F.R. § 800.122 (1975).

<sup>127</sup> See *Hodgson v. Corning Glass Works*, 474 F.2d 226, 232 (2d Cir. 1973); *aff'd*, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed. 2d 1 (1974); *Brennan v. Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 287-288 n.5; *Brennan v. City Stores, Inc.*, 479 F.2d 235, 239-240 (5th Cir. 1973). See also *National Automatic Laundry & Cleaning Council v. Shultz*, 143 U.S.App.D.C. 274, 282, 443 F.2d 689, 702 (1971).

<sup>128</sup> See, e.g., *Brennan v. Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 290.

<sup>129</sup> 29 C.F.R. §§ 800.126, 800.130(c). See, e.g., *Brennan v. Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 290-291; *Hodgson v. American Bank of Commerce*, *supra* note 121, 447 F.2d at 421-423; *Hodgson v. Brookhaven Gen. Hosp.*, *supra* note 100, 436 F.2d at 724-726.

<sup>130</sup> See, e.g., *Hodgson v. Brookhaven Gen. Hosp.*, *supra* note 100 ("orderlies" and "nurses aides").

[i]n determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance is given to such differences in setting the wage levels for such jobs. Such an inquiry may . . . disclose that apparent differences between jobs have not been recognized as relevant for wage purposes. . . .<sup>131</sup>

An employer cannot justify a pay differential by mere assumptions on career-orientation, the duration or probable length of working time, or a supposed respect for male authority and leadership.<sup>132</sup> Moreover, "training programs which appear to be available only to employees of one sex will . . . be carefully examined to determine whether such programs are, in fact, bona fide."<sup>133</sup>

An employer must show a consistent pattern of performance of additional duties in order to demonstrate that added duties are genuinely the motivating factor for the substantially higher pay. It is not sufficient that an increased workload might hypothetically have commanded a higher salary if it is not in fact the basis for a significantly greater wage. The employer may not fabricate an

<sup>131</sup> 29 C.F.R. § 800.122 (1975).

<sup>132</sup> 29 C.F.R. §§ 800.143, 1604(a) (1) (i) (1975).

<sup>133</sup> 29 C.F.R. § 800.148. See also *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1046-1047 (5th Cir.), *cert. denied*, 414 U.S. 822, 94 S.Ct. 121, 38 L.Ed.2d 55 (1973); *Hodgson v. Security Nat'l Bank*, 460 F.2d 57, 60-61 (8th Cir. 1972) (reversing a lower court decision which ruled that a male-dominated bank management training program was bona fide); *Hodgson v. Fairmont Supply Co.*, *supra* note 116, 454 F.2d at 498-499 (reversing a District Court finding which had upheld a sex-based sales training program); *Shultz v. First Victoria Nat'l Bank*, *supra* note 118, 420 F.2d at 655-657 (male-dominated "executive training programs" for bank tellers did not constitute a factor "other than sex" which would permit a pay differential where female tellers were never included in the training program).

after-the-fact rationalization for a sex-based pay difference. "[T]he semblance of [a] valid job classification system may not be allowed to mask the existence of wage discrimination based on sex."<sup>134</sup>

Often, evidence superficially purporting to justify greater pay as compensation for added work is found upon close examination to have inconsistencies which render its evidentiary value weaker. Where, for example, all male employees receive greater pay but only some perform the extra tasks allegedly justifying that pay, a reasonable inference is that maleness—not the added chores—is the basis for the higher wage. This is particularly true if the duties are of peripheral importance and the increase in pay is substantial.<sup>135</sup> Moreover, if some women without added compensation render the same extra performance that purportedly justified the pay differential favoring men, the inference becomes even stronger that the duties are irrelevant to the wage setting.<sup>136</sup> Similar evidence of

<sup>134</sup> *Brennan v. Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 285-286. See also, *Shultz v. Wheaton Glass Co.*, *supra* note 100, 421 F.2d at 265; *Hodgson v. Brookhaven Gen. Hosp.*, *supra* note 100, 436 F.2d at 723 n.3; *Hodgson v. American Bank of Commerce*, *supra* note 121, 447 F.2d at 422-423; *Shultz v. First Victoria Nat'l Bank*, *supra* note 118, 420 F.2d at 655.

<sup>135</sup> *Shultz v. Wheaton Glass Co.*, *supra* note 100, 421 F.2d at 263-264; *Hodgson v. Fairmont Supply Co.*, *supra* note 116, 454 F.2d at 493; *Hodgson v. Behrens Drug Co.*, *supra* note 132, 475 F.2d at 1047; *Brennan v. Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 285-286; *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 225 n.8 (7th Cir. 1972); *Shultz v. American Can Co.-Dixie Prods.*, *supra* note 116, 424 F.2d at 360-362.

<sup>136</sup> See *Brennan v. Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 288; *Hodgson v. Behrens Drug Co.*, *supra* note 132, 475 F.2d at 1047; *Hodgson v. Montana State Bd. of Educ.*, 336 F.Supp. 524, 525 (D. Mont. 1972).

discriminatory wage patterns is to be found where women are paid only for the amount of time actually spent on the extra work, but men are uniformly paid at the higher rate regardless of whether or not they are doing the work.<sup>137</sup> Additionally the Fourth Circuit has found corroborative evidence that higher pay is not related to extra duties when "qualified female employees are not given the opportunity to do the extra work."<sup>138</sup> The conclusion to be drawn, when any of these inconsistent patterns exists, is that

[d]espite claims to the contrary, the extra tasks were found to be makeweights. This left sex—which in this context refers to the availability of women at lower wages than men—as the one discernible reason for the wage differential. That, however, is precisely the criterion for setting wages that the Act prohibits.<sup>139</sup>

#### B. *The Case at Bar*

Applying these principles to the instant case, we perceive no error in the District Court's conclusion that the alleged differences in occupational duties proffered by NWA to justify the higher wage paid to pursers do not demonstrate that the stewardess and purser jobs are disparate. The court found that there is a uniform pay-scale for pursers which exceeds the pay-scale for stewardesses; and that these contrasting schemes are uncorrelated with

<sup>137</sup> *Shultz v. American Can Co.-Dixie Prods.*, *supra* note 116, 424 F.2d at 360-361.

<sup>138</sup> *Brennan v. Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 286, citing *Shultz v. Wheaton Glass Co.*, *supra* note 100.

<sup>139</sup> *Brennan v. Prince William Hosp. Corp.*, *supra* note 105, 503 F.2d at 286, citing *Brennan v. City Stores, Inc.*, *supra* note 127, 479 F.2d at 241 n.12 and *Hodgson v. Brookhaven Gen. Hosp.*, *supra* note 100, 436 F.2d at 726.

pursers' and stewardesses' respective employment burdens. Pursers flying exclusively on domestic routes with no international documentation obligations are compensated evenly with pursers on international flights,<sup>140</sup> despite the company's insistence that the onus of international flying is one of the explanations of the greater purser salary. To be sure, stewardesses who staff international flights do receive a foreign-flying supplement, but pursers' pay remains 20 to 35 percent larger than that of stewardesses of comparable seniority engaging solely in international travel.<sup>141</sup>

Pursers consistently assigned to flights on which they do not function as the senior cabin attendant receive the same salary as those flying constantly in that capacity,<sup>142</sup> while stewardesses rendering like service derive no supplemental income.<sup>143</sup> A greater mantle of supervisory responsibility supposedly inherent in the position of senior cabin attendant thus does not exonerate the extra compensation awarded pursers. In fact, stewardesses' supervisory labors may exceed those of pursers. The more junior cabin attendants who need more supervision are relegated by the seniority flight-bidding system to the tourist-class section of the least desirable domestic flights, and the probability is that a stewardess acting as senior cabin attendant or senior-in-tourist will be charged with training as well as normal supervision.<sup>144</sup> Pursers, possessing the bidding power to obtain the more popular flights, are positioned in the first-class section with the more senior stewardesses, who require little or no super-

<sup>140</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 784-787 (Finds. 62, 63, 70-73).

<sup>141</sup> *Id.* at 788 (Find. 80).

<sup>142</sup> *Id.* at 776-777, 787-789 (Finds. 41, 72, 78-81).

<sup>143</sup> *Id.* at 786 (Find. 70).

<sup>144</sup> *Id.* (Find. 68).

vision.<sup>145</sup> The District Court further found that "a substantial percentage of the Company's overall utilization of pursers consisted of their assignment . . . exclusively, for months or years at a time,"<sup>146</sup> to flights on which their functions are "identical"<sup>147</sup> to or "less demanding"<sup>148</sup> than stewardesses' tasks.

In sum, stewardesses are confined to the same lower salaries whether or not flying as the senior cabin attendant, regardless of how taxing the service on their flights may be, and irrespective of the performance of documentation work. Pursers, at all times and under all conditions, received substantially superior salaries.<sup>149</sup> This evidence leads convincingly to the conclusion that the contrast in pay is a consequence of the historical willingness of women to accept inferior financial rewards for equivalent work—precisely the outmoded practice which the Equal Pay Act sought to eradicate.<sup>150</sup>

Nor can NWA reasonably contend that it gives pursers higher salaries because, as a group, they discharge extra duties more frequently than stewardesses, and thus for accounting convenience are recompensed equally. As the District Court found, the company "maintains records which enable it to determine what flight a given cabin attendant has flown each day, the position held each day, and the time spent by that cabin attendant each day."<sup>151</sup> But as the court further found,

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 787 (Find. 73).

<sup>147</sup> *Id.* at 786-787 (Find. 71).

<sup>148</sup> *Id.* at 787 (Find. 72).

<sup>149</sup> *Id.* at 788 (Find. 80).

<sup>150</sup> See text *supra* at notes 113-114.

<sup>151</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 788-789 (Find. 81).

[t]hese records enable the Company to pay cabin attendants different amounts for different portions of their monthly service. Flight service attendants temporarily filling pursers vacancies are paid the purser rate only while flying as pursers. Stewardesses flying international receive the "foreign flying" supplement only for the hours spent on the international flight. Permanently assigned pursers receive the purser rate . . . whether or not they are filling the purser position on the flight and irrespective of the kind of flight, domestic, foreign or interport. Except for the "foreign flying supplement" all stewardesses of a given longevity receive the same salary, irrespective of the nature of the flights or the position occupied on the flight.<sup>152</sup>

The records would facilitate the ascertainment of differential salaries for dissimilar portions of the monthly service if in fact the activities purportedly justifying the larger salary were really the reason for the added compensation.

It is not legally appropriate to accord stewardesses salary increments only when they serve as the senior cabin attendant. We have pointed to the inconsistencies between occupational tasks and rewards to underscore our conviction that the District Court properly concluded that any greater duties demanded of pursers is not the foundation for their higher pay.<sup>153</sup> In no way does this

<sup>152</sup> *Id.*

<sup>153</sup> It is argued that pursers are salaried higher because they must function under more onerous working conditions—in that they are confined to a more restricted bidding schedule and are assigned to more foreign flights. However, stewardesses with foreign language proficiency are confined to an even more restricted bidding schedule and yet they are paid at the rate applicable to other stewardesses. *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 778 (Find. 44). And foreign flying stewardesses are assigned to more

detract from the court's finding that the senior-cabin-attendant function was a mission that did not alter the basic equality of all cabin attendant jobs:

The "supervisory" functions of Senior cabin attendants—whether purser or stewardess—are less

foreign flights but receive only the same flying supplement that all stewardesses get for any foreign flying. *Id.* Moreover, pursers realize substantially higher pay than do stewardesses engaged in foreign flying. Therefore, NWA cannot justify the increased purser-pay on the basis of more restricted bidding schedules or more extensive foreign flying since stewardesses subjected to these same circumstances are nevertheless paid considerably less.

More importantly, NWA cannot support the higher pay on the ground that pursers and stewardesses perform their jobs under different working conditions. In *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 202-203, 94 S.Ct. at 2231-2232, 41 L.Ed.2d at 14-15, the Supreme Court defined "working conditions" as a term having a "different and much more specific meaning" than "a layman might . . . assume." Only "surroundings"—such as toxic chemicals or fumes regularly encountered by a worker—and "hazards"—such as those which pose the risk of severe physical injury—are encompassed within the meaning of "working conditions." The District Court's finding that stewardesses and pursers perform under similar working conditions is thus amply supported in the record.

NWA also asserts on appeal that even if the District Court was correct in holding that the jobs of stewardess and purser are equal, at least part of the compensation received by pursers falls within an exception to the Act as payment made pursuant to "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv) (1970). NWA contends that one factor other than sex is foreign flying; it points out that since stewardesses on foreign flights get a foreign flying supplement, at least that portion of purser salary rests on a factor other than sex. The counter-argument advanced is that the exception to the Act is an affirmative defense which NWA has waived because it was never pleaded. We need not resolve this issue, however, since even if NWA

important than, and require no greater skill, effort or responsibility, than the other functions assigned to all cabin attendants.<sup>154</sup>

We cannot say that this finding is clearly erroneous, and it follows that all cabin attendants perform equal work and are legally entitled to places on equal salary scales. Although the senior cabin attendant is "responsible" for the cabin crew during the flight, the Secretary of Labor's regulations define job responsibility in terms of the degree of employee accountability for job performance.<sup>155</sup> At the trial of this case, witnesses testified that both pursers and stewardesses are disciplined substantially less for unsatisfactory performance as senior cabin attendant than for subpar passenger service. And although the company imposes rigorous sanctions on cabin attendants charged with misconduct affecting customer relations, its records disclose only one instance of disciplinary action against a purser for failure to adequately

properly raised the defense, it has not shouldered its burden of proving it.

The District Court implicitly found that the purser salary is not based on foreign flying, when it found that a "substantial percentage of the Company's overall utilization of pursers consisted of their assignment to pure domestic flights or to the domestic segments of international flights," *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 787 (Find. 73), and that pursers received the same pay regardless of whether they were engaged in foreign flying. *Id.* at 788-789 (Find. 81). Consequently, NWA did not sustain its burden of proving that part of the purser salary was intended as compensation for foreign flying and was not "an added payment based on sex." *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 204, 94 S.Ct. at 2233, 41 L.Ed.2d at 15.

<sup>154</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 786 (Find. 69).

<sup>155</sup> 29 C.F.R. § 800.129 (1975), and note the examples, *id.* at § 800.130.

monitor the work of other cabin attendants. This strongly suggests that the provision of high quality service to passengers—exacted of all cabin attendants—is the most important undertaking for which the company compensates pursers and stewardesses. The increased responsibility borne by the more senior personnel in both classifications is rewarded by larger salaries given to those on the upper rungs of the pay ladder, and this will continue with a combined stewardess-purser salary scale.

In a similar case, the Fifth Circuit reversed a finding that a salary differential between male and female bank tellers was justified by the men's supposedly greater managerial role in "supervising the cashing of checks, helping the other tellers balance out, and generally acting as trouble-shooters when unusual or difficult problems arose."<sup>156</sup> The court found it "doubtful at best that such small, insignificant additional duties can ever serve as a justification for the differential evidenced in the Bank's wage figures."<sup>157</sup> We affirm the District Court's findings that NWA purser and stewardess positions are substantially equal within the intent of the Equal Pay Act and demand financial response at the purser-level of recompense.<sup>158</sup>

<sup>156</sup> *Hodgson v. American Bank of Commerce*, *supra* note 121, 447 F.2d at 422.

<sup>157</sup> *Id.*

<sup>158</sup> Once the stewardess position is found to be equal work to that of purser, not only must access to the job of purser be granted to women, but women who remain stewardesses must also be given pay equal to pursers'. The wage rates for male employees cannot be reduced to achieve equality, because the proviso to 29 U.S.C. § 206(d)(1) insures that in fashioning a remedy, "an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1) (1970).

#### IV. THE TITLE VII CLAIMS

The Equal Pay Act's ban on sex-based discrimination in pay is largely paralleled by Title VII's condemnation of "discriminat[ion] against any individual with respect to his compensation . . . because of such individual's . . . sex. . . ." <sup>159</sup> So it is that NWA's policy of rewarding stewardesses unequally for work equal to that of pursers, which we have just confirmed as an Equal Pay Act violation, meets a similar fate under Title VII.<sup>160</sup> The District Court so held,<sup>161</sup> and its judgment directs back pay under Title VII to each shortchanged employee for any period that it is nonrecoverable under the Equal Pay Act.<sup>162</sup> Remedies aside,<sup>163</sup> we face no further Equal Pay Act problem as to stewardesses' salaries.

NWA does, however, protest rulings by the District Court that other company policies tread on stewardesses' statutory rights.<sup>164</sup> The areas of controversy are marked by the stewardesses' complaints of discrimination in the provision of layover accommodations for cabin attendants, in company allowances for maintenance of their uniforms, and in weight restrictions formally imposed only on women. While the first two complaints might be addressed independently under the Equal Pay Act on a theory of wage discrimination,<sup>165</sup> or perhaps even under

<sup>159</sup> See text *supra* at note 91.

<sup>160</sup> See text *supra* at note 91.

<sup>161</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 789 (Concl. 4).

<sup>162</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1386-1387.

<sup>163</sup> See Part V *infra*.

<sup>164</sup> Many of these policies have been changed since this litigation was instituted.

<sup>165</sup> See note 175 *infra*.

Title VII as a matter of discrimination in compensation,<sup>166</sup> we may acceptably approach the three primarily on the basis of Title VII's ban on "discriminat[ion] against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." <sup>167</sup>

Until recently, only female stewardesses were subject to the company's weight restrictions, which if exceeded resulted in suspension or discharge.<sup>168</sup> Stewardesses in times past at least were also required to share rooms with each other during flight layovers, while male cabin attendants were routinely reimbursed for single rooms.<sup>169</sup> In addition, as the District Court found the company's allowances for the cleaning and replacement of uniforms differ to the detriment of female cabin attendants.<sup>170</sup> These policies, which have operated disadvantageously upon employees who are women, clearly deprived stewardesses of rights secured by Title VII. NWA does not contend that the practices do not constitute discriminatory conditions of employment, but defends its conduct as inadvertent and unintentional. We find this defense unavailing. The legislative history of Title VII indicates that the Act requires only a general intent to discrimi-

<sup>166</sup> See text *supra* at note 91 and note 175 *infra*.

<sup>167</sup> See text *supra* at note 91.

<sup>168</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 773-774 (Find. 39).

<sup>169</sup> *Id.*

<sup>170</sup> Other company policies found violative of stewardesses' statutory rights—by rulings not contested on appeal—prohibited them from wearing eyeglasses, required them to purchase prescribed luggage, and imposed on them a shorter height limitation. *Id.* at 790 (Concl. 5(h)). See note 24 *supra*.

nate,<sup>171</sup> and prohibits any discriminatory practice which

<sup>171</sup> In reference to Title VII's enforcement provisions, § 706 (g), 42 U.S.C. § 2000e-5(g) (1970), which authorizes legal and equitable relief against an employer "intentionally" engaging in an unlawful employment practice,

[i]n determining the meaning of "intentional," resort must be had almost entirely to legislative history. In its original form, 706(g) contained no such requirement; it was amended by Senator Dirksen's proposal, probably in response to opposition pressure. The first draft of the amendment contained the word "willfully" instead of "intentionally"; interpretative material was introduced into the record by Senator Dirksen:

The words "willful and willfully" as ordinarily employed, mean nothing more than that the person, of whose actions or default the expressions are used, knows what he is doing, intends what he is doing, and is a free agent. . . .

The terms are also employed to denote an intentional act . . . as distinguished from an accidental act . . . .

This is precisely the situation which might exist if the words are not added. . . . Accidental, inadvertent, heedless, unintended acts could subject an employer to charges under the present language.

For reasons that are not apparent, this version was not enacted, and not until some time later was the amendment with the present language passed. The only significant difference between the two versions is the substitution of "intentionally" for "willfully" and there is no indication that any strengthening of the requirement was meant. It may be concluded that the Dirksen Amendment does not greatly narrow the coverage of section 706(g).

*Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 995-996 n.15 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970), quoting Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Colum. L. Rev. 691, 713 (1968). See also cases cited *infra* note 174.

was not merely accidental.<sup>172</sup> If an employer intends to promulgate the later found to be improper policy—that is, "the defendant meant to do what he did"<sup>173</sup>—there is no burden to show additional discriminatory motivation in order to recover under Title VII.<sup>174</sup>

The company counters the charge of discrimination in the provision of layover accommodations by insisting that male cabin attendants were instructed to share rooms but that they departed from company policy by booking single rooms.<sup>175</sup> The District Court nonetheless upheld

<sup>172</sup> *Local 189, United Papermakers & Paperworkers v. United States*, *supra* note 171, 416 F.2d at 995-997.

<sup>173</sup> *Id.* at 996.

<sup>174</sup> "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.'" *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 422, 95 S.Ct. 2362, 2374, 45 L.Ed.2d 280, 299 (1975), quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158, 165 (1971) (emphasis in original). See, e.g., *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251, 1259 (5th Cir. 1975); *Frobig v. Held Warehouse and Transp. Corp.*, 8 F.E.P. Cas. 926, 929-930 (E.D.N.Y. 1974) ("[t]here is . . . no necessity that [payment of lower wages to female as opposed to male employees] be found to be based on any calculated denigration of women or women's work as distinguished from the simple, conscious paying of a lower rate of pay to women doing equal work than the rate paid to men doing the same work in the same pay periods").

<sup>175</sup> NWA also challenges the District Court's determination that the furnishing on layovers of single rooms to male employees and only double rooms to female employees also violates the Equal Pay Act. *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 789 (Concl. 2). The company contends that lodging does not constitute wages within the meaning of the Act because regulations promulgated thereunder indicate that "payments made by an employer to an em-

ployee which do not constitute remuneration for employment are not 'wages' to be compared for equal pay purposes under" 29 U.S.C. § 206(d)(1) (1970). 29 C.F.R. § 800.110 (1975). Examples given of payments which are not deemed remuneration are those for maternity and "such reimbursable expenses of traveling on the employer's business as are discussed in [29 C.F.R.] § 778.217." The regulation cited provides in part that "[w]here an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, . . . [p]ayments made by the employer to cover such expenses are not included in the employee's regular rate. . . . Such payment is not compensation for services rendered by the employee during any hours worked in the workweek."

However, NWA ignores other provisions of the Fair Labor Standards Act and of other regulations formulated under the Equal Pay Act. Specifically, 29 U.S.C. § 203(m) provides in part that "[w]age' paid to any employee includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." And a regulation implementing the Equal Pay Act specifies that "[t]he reasonable cost or fair value of certain prerequisites, as provided in [29 U.S.C. § 203(m)] . . . is, by definition, a part of the wage paid to an employee for purposes of the Act." 29 C.F.R. § 800.112 (1975).

It is thus clear that where, as here, the employer customarily furnishes lodging for the employees, as opposed to merely reimbursing them for expenditures made for lodging not regularly supplied, the cost thereof constitutes wages under the Equal Pay Act. Though not entirely manifest from the District Court's finding, *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 774 (Find. 39), both sides make it clear that the company's payments were made directly to the hotels and not to the employees as reimbursement. Accordingly, the District Court was correct in holding that the provision of less expensive and less desirable lay-over accommodations to female employees than were provided to male employees is in derogation of the Equal Pay Act.

the charge<sup>176</sup> and its ruling is amply sustained. NWA has consistently paid for single accommodations for male employees<sup>177</sup> That more than sufficiently manifests an attitude condoning the alleged breach of company policy.

NWA has also seen fit to differentiate its stipends for maintenance of uniforms. Men were given a cleaning allowance, while women received a replacement allowance. On evidence comparing the frequency of uniform replacement with the cost of keeping a supply of clean uniforms, the District Court found the policy discriminatory. We discern nothing in the record to disturb this finding.

Prior to suit, the company applied a different maximum height restriction to male and female employees. That differential was likewise held to be discriminatory.<sup>178</sup> Additionally to reinstatement and backpay for stewardesses suspended or terminated for failure to satisfy the weight restrictions,<sup>179</sup> the District Court enjoined NWA from weighing stewardesses, maintaining weight scales, conditioning employment upon an agreement to meet these standards, and punishing any female employee because of weight "unless [it] is such as to render her physically incapable of performing the duties of the job."<sup>180</sup> We

<sup>176</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 790 (Concl. 5(h)).

<sup>177</sup> *Id.* at 773-774 (Find. 30).

<sup>178</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1387-1388.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1387. The company was also ordered to notify all female cabin attendants that the weight requirements and their agreements to adhere thereto would no longer be enforced, and to remove from the cabin service manual any mention of weight requirements beyond such as would render a person "physically incapable of performing the duties of

affirm the court's resolve to accord reinstatement and backpay to those who suffered from the application of the weight requirements.<sup>181</sup> NWA, however, appeals that portion of the order enjoining the imposition of any weight standard upon any stewardess unless weight prevents discharge of the responsibilities of the employment. NWA has promulgated new weight restrictions for both male and female employees, to operate in a nondiscriminatory fashion. NWA insists that these standards, to affect everyone equally, bring it into compliance with Title VII, and that may well be so. If the present regulations, applied objectively and in good faith, pass muster under Title VII, the company will become entitled to modification of this aspect of the injunction by the District Court. The Company must, however, be prepared to demonstrate that the current restrictions are not a veiled means of retaliation for the institution of this action.<sup>182</sup>

the job." *Id.* In addition, reinstatement and back pay were ordered for those who had been terminated or grounded on account of weight, and the company was directed to excise from personnel records indication of reprimands arising from noncompliance with those restrictions. *Id.* at 1387-1388.

<sup>181</sup> NWA does not challenge the District Court's conclusion that it discriminated against stewardesses through the use of the weight restrictions. Nor does NWA contest the District Court's order that NWA offer immediate reinstatement to each stewardess suspended or terminated as a result of being overweight. However, the company does attack that part of the court's order which requires it to grant backpay to stewardesses who could not have filed timely charges with the Equal Employment Opportunity Commission on the date that the first filing with the Commission was made by a class member. We consider that issue in Part V(D) *infra*.

<sup>182</sup> Retaliation, it is said, takes the form of pitting male employees against female employees in anger over the latter's having precipitated an unwanted condition covering men.

We recognize that Title VII discourages the use of even nondiscriminatory but newly-promulgated employee-selection criteria where there is a history of discriminatory treatment of some employees who would continue to be hurt by the new criteria. In *Griggs v. Duke Power Company*,<sup>183</sup> the Supreme Court forbade the application of a fair and even-handed standard to black employees who had been barred from formerly "white" jobs when the selection criteria had applied only to blacks:

Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.<sup>184</sup>

Similarly, the Second Circuit has affirmed an order requiring admission of incumbent black employees to apprenticeship programs if they were "at least as qualified as the least qualified white" previously accepted, despite the subsequent adoption of a more stringent, nondiscriminatory admission standard.<sup>185</sup> And the Equal Employment Opportunity Commission provides by regulation that

It is claimed that if new restrictions are permitted against all employees, the stewardesses' victory is hollow since they would have won only an expansion of the scope of the old restrictions rather than any alleviation thereof for themselves. Because this claim has not been fully litigated as a factual matter in the District Court, we intimate no view on it.

<sup>183</sup> *Supra* note 174.

<sup>184</sup> *Griggs v. Duke Power Co.*, *supra* note 174, 401 U.S. at 430, 91 S.Ct. at 853, 28 L.Ed.2d at 163-164. See also *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1370 & n.7 (5th Cir. 1974).

<sup>185</sup> *United States v. Bethlehem Steel Corp.*, *supra* note 109, 446 F.2d at 665.

no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.<sup>186</sup>

Applied to the instant case, this principle protects the right of suspended or discharged stewardesses to be reinstated, to be awarded backpay and to have their personnel files rectified for the period of discipline for failure to comply with a restriction which was not imposed on pursers.<sup>187</sup> At that juncture, the position of these stewardesses will be equalized with that of all pursers who were employed during the same period regardless of weight. The stewardesses discriminated against in the past are thus afforded an opportunity to regain their jobs and, on a parity with the most overweight purser employed by NWA, meet the requirements in the future. As long as the company henceforth extends equal treatment in this regard to all pursers and stewardesses in its employ—including all pursers hired in the past, who now must measure up to the new restrictions or be discharged—we cannot say that its desire for trimness in those rep-

<sup>186</sup> "A test or other employee selection standard . . . cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members, have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to those other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination." 29 C.F.R. § 1607.11 (1975).

<sup>187</sup> See, however, Parts V(C), (D) *infra*.

resenting it in public is discriminatory or unreasonable. We affirm, then, the District Court's conclusion that the inferior pay scales and working conditions to which stewardesses have been subjected entitles them to relief under Title VII and the Equal Pay Act.

## V. THE REMEDIAL ORDER

The District Court's judgment is devoted in substantial measure to remediation of violations found, under either the Equal Pay Act or Title VII, with respect to sex-based differentials in salaries, pensions, layover lodgings furnished and uniform-maintenance allowances.<sup>188</sup> In each category, the judgment effects an equalization upward<sup>189</sup> by mandating for female employees the same treatment that NWA had theretofore afforded male employees,<sup>190</sup> and enjoins sex discrimination in any significant aspect of employment of cabin attendants<sup>191</sup> in the future.<sup>192</sup> The judgment also awards backpay<sup>193</sup> under the Equal

<sup>188</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1382-1390.

<sup>189</sup> As we have heretofore observed, see note 158 *supra*, the Equal Pay Act forbids attempted compliance with its provisions by "equalization" through a downward revision of pay. 29 U.S.C. § 206(d)(1) (1970). See *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 206-207, 94 S.Ct. at 2233-2234, 41 L.Ed.2d at 16-17.

<sup>190</sup> *Laffey v. Northwest Airlines*, *supra* note 1.

<sup>191</sup> The judgment defines "cabin attendants" as "all American-based employees of [NWA] whose principal duties consist of providing in-flight cabin service, whether denominated stewardess, purser, flight service attendant, steward, or otherwise." *Id.* at 1384.

<sup>192</sup> *Id.* at 1385.

<sup>193</sup> Grouped as backpay, though addressed discretely, are cabin attendants' salaries, pensions, the value of lodgings furnished and allowances for uniform-maintenance. *Id.* at 1385-1387.

Pay Act to each "Equal Pay Act plaintiff"<sup>191</sup> for the three-year period preceding the filing of that plaintiff's written consent to joinder in the suit as a claimant therefore;<sup>192</sup> it similarly grants backpay under Title VII to each "Title VII plaintiff"<sup>193</sup> for the period commencing two years prior to the filing of the first charge with the Equal Employment Opportunity Commission,<sup>194</sup> terminating, however, for each employee who is also an Equal Pay Act plaintiff at the beginning of her Equal Pay Act recovery period.<sup>195</sup> NWA complains that some of these provisions go too far, and affected employees insist that the relief granted on these subjects does not extend far enough.

#### A. *Period of Backpay Recovery Under the Equal Pay Act*

Congress has imposed time limits upon the initiation of employee suits under the Equal Pay Act for either backpay or liquidated damages. The relevant statute specifies that any such action

may be commenced within two years after the cause of action accrued, and . . . shall be forever barred

<sup>194</sup> "Equal Pay Act plaintiff(s)" in the judgment are "all female cabin attendants employed by [NWA] who filed timely written consents with this Court, in accordance with 29 U.S.C. § 256 [1970], to become parties plaintiff with respect to the Equal Pay Act aspects of this lawsuit." *Id.* at 1384.

<sup>195</sup> *Id.* at 1385-1386.

<sup>196</sup> "Title VII plaintiff(s)" under the judgment are "all female cabin attendants employed by [NWA] at any time on or after July 2, 1965, excluding only those who filed timely elections with this Court to be excluded from this lawsuit in its entirety." *Id.* at 1384.

<sup>197</sup> See Part V(C) *infra*.

<sup>198</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1386-1387.

unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. . . .<sup>199</sup>

The District Court found NWA's Equal Pay violation "willfull" within the meaning of this provision<sup>200</sup> and awarded the Equal Pay Act plaintiffs<sup>201</sup> backpay<sup>202</sup> for three-year periods preceding the filing of timely written consents.<sup>203</sup> NWA contends that retrospection of its backpay liability for periods exceeding two years is an erroneous application of the statute. The core argument, as we understand, is that the statutory word "willfull" connotes an unwholesome state of mind said to be absent in this case, particularly since in an independent ruling the District Court denied liquidated damages upon a finding that NWA's sex-discriminatory policies were pursued in good faith.<sup>204</sup>

#### —(1) *The Standard For Determining Willfulness*

The suit-limitation provision does not undertake to define "willfull" on its own, nor have we encountered elsewhere in companion legislation any definition seemingly referable to that provision.<sup>205</sup> Courts wrestling with its facial ambiguity have usually subscribed to one or the other of two divergent views. Some, notably in the Fifth Circuit, read "willfull" as requiring nothing more than

<sup>199</sup> 29 U.S.C. § 255(a) (1970).

<sup>200</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

<sup>201</sup> See note 194 *supra*.

<sup>202</sup> See note 193 *supra*.

<sup>203</sup> See note 194 *supra* and accompanying text.

<sup>204</sup> We discuss that finding in Part V-B *infra*.

<sup>205</sup> See note 230 *infra*.

knowledge of the possible applicability of the governing statute to the conduct eventually held to be legally wanting.<sup>206</sup> "Stated most simply," says the Court of Appeals for that circuit, "we think the test should be: Did the employer know the [statute] was in the picture."<sup>207</sup> Other courts take a differently worded approach:<sup>208</sup> "[W]illful," declares one, "retains its traditional meaning that violations of the Act must be deliberate, voluntary and intentional."<sup>209</sup> NWA urges upon us still another meaning: that "willfull" requires bad purpose as an element of the violation.

Under some statutes, particularly those directed at conduct involving moral turpitude, an act is "willfull" only if done malevolently, wickedly or criminally.<sup>210</sup> Under

<sup>206</sup> *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974); *Brennan v. J. M. Fields, Inc.*, 488 F.2d 443, 448 (5th Cir. 1973), *cert. denied*, 419 U.S. 881, 95 S.Ct. 146, 42 L.Ed.2d 121 (1974); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 828-829 (5th Cir. 1973); *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1138, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972).

<sup>207</sup> *Coleman v. Jiffy June Farms, Inc.*, *supra* note 206, 458 F.2d at 1142.

<sup>208</sup> *Hodgson v. Unified School Dist.*, 21 Wage & Hour Cas. 574, 577 (D. Kan. 1973); *Boll v. Federal Reserve Bank*, 365 F.Supp. 637, 648-649 (E.D. Mo. 1973), *aff'd*, 497 F.2d 335 (1974); *Brennan v. Westinghouse Credit Corp.*, 21 Wage & Hour Cas. 871, 875-876 (E.D. Tenn. 1973). See also *Dunlop v. New Jersey*, 522 F.2d 504, 518 (3d Cir. 1975); *Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 467 (8th Cir. 1973); *Hodgson v. Barge, Waggoner & Sumner, Inc.*, 377 F.Supp. 842, 845 (M.D. Tenn. 1972), *aff'd*, 477 F.2d 598 (6th Cir. 1973).

<sup>209</sup> *Brennan v. Westinghouse Credit Corp.*, *supra* note 208, 21 Wage & Hour Cas. at 876.

<sup>210</sup> *E.g.*, *Spurr v. United States*, 174 U.S. 728, 734-735, 19 S.Ct. 812, 814-815, 43 L.Ed. 1150, 1152-1153 (1899).

other types of statutes, it suffices that the act was performed consciously and voluntarily, rather than inadvertently or accidentally.<sup>211</sup> Betwixt these two formulations, "willfull" has been given various other meanings,<sup>212</sup> although shades of difference oftentimes diminish when the probe extends beneath the surface.<sup>213</sup> Because of its inherent instability, only the most careful consideration of the term "willfull" in its legislative context can provide satisfactory assurance that eventually it will take on its proper cast.<sup>214</sup> And so it does here.

The suit-limitation provision in its original form was part of the congressional response to an "existing emergency"<sup>215</sup> three decades ago. In 1946, the Supreme Court had held that employees were entitled to portal-to-portal pay under the Fair Labor Standards Act.<sup>216</sup> In 1947, Congress declared that allowance of claims therefor would create "wholly unexpected liabilities, immense in amount

<sup>211</sup> *E.g.*, *Nabob Oil Co. v. United States*, 190 F.2d 478, 480 (10th Cir.), *cert. denied*, 342 U.S. 876, 72 S.Ct. 167, 96 L.Ed. 658 (1951).

<sup>212</sup> See, *e.g.*, *United States v. Murdock*, 290 U.S. 389, 394-395, 54 S.Ct. 223, 225, 78 L.Ed. 381, 384-385 (1933).

<sup>213</sup> "It is only in very few criminal cases that 'willfull' means 'done with a bad purpose.' Generally, it means 'no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.'" *Townsend v. United States*, 68 App.D.C. 223, 229, 95 F.2d 352, 358, *cert. denied*, 303 U.S. 664, 58 S.Ct. 830, 82 L.Ed. 1121 (1938).

<sup>214</sup> See *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418, 422 (1943).

<sup>215</sup> 29 U.S.C. § 251 (1970).

<sup>216</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946).

and retroactive in operation,"<sup>217</sup> and enacted legislation to deal with the situation.<sup>218</sup> A limitation period of two years for all claims<sup>219</sup> was designed specifically to eliminate differences arising from "the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers . . . ."<sup>220</sup> Its aim thus was to establish for employee recoveries a nationally uniform cutoff point, whether for purposeful or innocent transgressions of the Act.

The limitation period continued at two years until enactment of the Fair Labor Standards Amendments of 1966.<sup>221</sup> During the process leading to that legislation, an effort was made to enlarge the limitation period to three years for any type of violation, for reasons expressed by the then Secretary of Labor:

The lengthening of the statute of limitations to three years will allow workers more time to familiarize themselves with their legal right to back wages and thus improve enforcement of the Act. The short statute of limitations gives competitive advantage to violators and penalizes many workers in the collection of wages legally due. The Federal Criminal Statute runs for three years or more. The existing two-year period under [the Fair Labor Standards Act] is also shorter than that allowed creditors of

<sup>217</sup> 29 U.S.C. § 251 (1970).

<sup>218</sup> The legislation was the Portal-to-Portal Act of 1947, Act of May 14, 1947, ch. 52, 61 Stat. 84, as amended, 29 U.S.C. §§ 251 *et seq.* (1970). See also *Steiner v. Mitchell*, 350 U.S. 247, 253, 76 S.Ct. 330, 334, 100 L.Ed. 267, 272 (1956).

<sup>219</sup> Act of May 14, 1947, ch. 52, § 6, 61 Stat. 87.

<sup>220</sup> Act of May 14, 1947, ch. 52, § 1, 61 Stat. 84, 29 U.S.C. § 251.

<sup>221</sup> Pub.L. No. 89-901, 80 Stat. 830 (1966).

employees to collect money owed for food and rent bills.<sup>222</sup>

As the bill emerged from committee, however, the limitation provision appeared in its current form.<sup>223</sup> The period had been lengthened to three years for a "will-full violation," but for others it remained at two.<sup>224</sup> We have not uncovered any clear-cut statement in the legislative history as to why the extension to three years was thus encumbered. There is ample room, however, for an informed belief that, with the amendments' broad expansion of the Act's coverage<sup>225</sup> and resultant concern over the effect on the small businessman,<sup>226</sup> an unqualified increase of the limitation period would bear too heavily upon an inevitably larger group of excusably inadvertent violators.<sup>227</sup>

Be that as it may, the important consideration is the absence from the legislative history of any visible move-

<sup>222</sup> Hearings on H.R. 8259 Before the General Subcommittee on Labor of the Committee on Education and Labor 7 (1965) (statement of Secretary Wirtz).

<sup>223</sup> S. Rep. No. 1487, 89th Cong., 2d Sess. 36, 69 (1966); H.R. Rep. No. 1366, 89th Cong., 2d Sess. 46, 77 (1966).

<sup>224</sup> See text *supra* at note 199.

<sup>225</sup> See S. Rep. No. 1487, 89th Cong., 2d Sess. 1-4 (1966); H.R. Rep. No. 1366, 89th Cong., 2d Sess. 4-10 (1966).

<sup>226</sup> "The proposed coverage brings small local business immediately into coverage. There are no exact figures on how many retail establishments would be affected by the bill, but there are definite indications that the number is substantial. . . . Businessmen state that they will have to reduce their work forces substantially and even then will be faced with the grave problem of whether or not they can remain in business." S. Rep. No. 1487, 89th Cong., 2d Sess. 76-77 (statement of Senator Fannin).

<sup>227</sup> See note 226 *supra*.

ment to impart criminal-law precepts of moral culpability into the statutory scheme as a condition to accountability for a civil wrong. There is nothing to suggest that the congressional effort either in 1947 or 1966 was the exaction of a penalty, to which moral culpability would be highly relevant. On the contrary, the implication is almost irresistible that the objective consistently was the erection of a bulwark to extensive liability, and to economic hardships that would follow. Because in 1947 Congress feared a crisis from enforcement of an unexpected multitude of newly-arising claims, and because in 1966 the coverage of the Act was being greatly widened to encompass a host of enterprises never before subjected, it seems evident that on each occasion Congress wished to insure that those who were unwittingly intercepted by the Act were not impacted with a three-year statute of limitations. These circumstances undergird the unlikelihood that "willfull," in this role, was intended to exact bad purpose on the employer's part—rather than simply a lesser factor reducing the employer's predicament to something less than a wholly unanticipated prospect of late-found liability—as a precondition to an extra year's recovery.

It seems also significant that the requirement of willfullness is not one which must be met in order that there be liability, but rather is one to be satisfied before there can be expanded liability. The nonwillfull character of a violation of the Act does not defeat recovery, although it does confine the period therefor to two years, and a willfull violation lengthens the period merely by another year. An employer out of compliance, but not willfully so, is spared the burden of recompense beyond a period of two years; an employer willfully out of compliance, despite his willfullness is spared beyond a period of three years. The relatively small difference between the two- and three-year periods tends to question any notion that

the distinguishing criterion was to be moral rather than intellectual culpability. Since a morally innocent employer is nonetheless liable for two years, one may ask why a "willfull" violator's accountability is for only one year more if the term is to imply wicked purpose.

We realize, of course, that a lighter burden would subject a good many employers to the extra year of liability notwithstanding that their violations may represent little or no more than an erroneous interpretation of the statutory requirements. On the other hand, employers as a class occupy a much superior position vis-a-vis their employees to ascertain the effect of the law upon their business policies and practices. Even where the closeness of the question of the statute's applicability hampers or forestalls absolute decisional accuracy, there is no good reason for translating the employer's error into a loss of pay for the employee.

Atop all else, the Equal Pay Act, and the Fair Labor Standards Act of which the former is a part, undoubtedly are remedial statutes, as such to be liberally construed in favor of their intended beneficiaries.<sup>228</sup> In light of this, as well as the historical backdrop against which we must view this legislation, we could not readily attribute to Congress a purpose to impose upon employee-claimants the much heavier burden—sometimes, perhaps, a well-nigh impossible burden—of proving an iniquitous employer state-of-mind as a prerequisite to a backpay recovery for the third year. We reject, then, a definition of "willfull" in the suit-limitation provision which would demand proof that the employer entertained a bad purpose or an evil intent. At the same time, we need not

<sup>228</sup> E.g., *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 208, 94 S.Ct. at 2234-2235, 41 L.Ed.2d at 17; *Coles v. Penny*, — U.S.App.D.C. —, —, 531 F.2d 609, 615 (1976).

go so far as to hold that a violation is willfull merely because from the employer's viewpoint the statute was in the picture.<sup>229</sup> Nor need we undertake to precisely define "willfull" for cases closer than the one at bar.<sup>230</sup> We think that at the very least the employer's noncompliance is "willfull" when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt.<sup>231</sup> We think, too, that the same conclusion

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<sup>229</sup> As one commentator has observed, "[s]ince virtually every employer knows of the possible applicability of [the Fair Labor Standards Act] to his business, the practical effect of this interpretation is to eliminate the two year statute of limitations from the act. If this were the result Congress intended, it would not have drafted the statute so that the two year period is the rule and the three year period is the exception." Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 Ark. L. Rev. 328, 338 (1975).

<sup>230</sup> NWA contends that "willful," in the suit-limitation provision takes on the interpretation given the same work in the criminal provision of the Fair Labor Standards Act, 29 U.S.C. § 216(a) (1970). We do not agree that the criminal construction is to be imparted into the civil provision simply because both provisions are part of the same statute. The purposes of the two sections are entirely different; one punishes as criminal certain specified conduct while the other subserves a policy to which punishment is entirely foreign. Compare *Corning Glass Works v. Brennan*, *supra* note 111, 417 U.S. at 207, 94 S.Ct. at 2234, 41 L.Ed.2d at 17. In any event, under § 216's definition of "willful," "[i]t is sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence." *Nabob Oil Co. v. United States*, *supra* note 211, 190 F.2d at 480. We reach no different conclusion in this case by that definition. See note 232 *infra* and accompanying text. Compare *Coleman v. Jiffy June Farms, Inc.*, *supra* note 206, 458 F.2d at 1142.

<sup>231</sup> Compare *Brennan v. Heard*, *supra* note 206, 491 F.2d at 3.

follows when an equally aware employer consciously and voluntarily charts a course which turns out to be wrong.<sup>232</sup> Beyond these holdings, we need not venture now.

#### —(2) *The Decision On NWA*

The District Court expressly found NWA's multifold violations of the Equal Pay Act to be "willfull".<sup>233</sup> The court explained:

The Equal Pay Act violation was willful in that [NWA] was fully aware of the Equal Pay Act and adopted a deliberate and knowing course of conduct despite its awareness. The Court does not find an intentional, bad faith, attempt to evade the law. The judgment of [NWA] that its conduct would not be found to be in violation of the Equal Pay Act has been found to be in error. The conduct of [NWA] in the exercise of that judgment was willfull.<sup>234</sup>

This finding is fully binding upon us unless "clearly erroneous."<sup>235</sup> NWA does not say that the finding lacks evidentiary support in the record, nor could it. An official of NWA testified by deposition that since 1963 the company was aware of the Equal Pay Act, was generally familiar with its provisions, and had internally reviewed it for its possible application to the company.<sup>236</sup> NWA understood the Act's central provision that male and female employees cannot be paid differently for perform-

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<sup>232</sup> In situations of that sort, "the act [is] deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence." See note 230 *supra*.

<sup>233</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

<sup>234</sup> *Id.*

<sup>235</sup> Fed.R.Civ. P. 52(a).

<sup>236</sup> J.App. 1477-1478.

ing substantially the same work, and considered its own policies respecting cabin attendants in that light.<sup>237</sup> The company concluded that the Act was inapplicable because it felt that the purser and stewardess jobs were substantially different.<sup>238</sup> Even after the filing of charges with the Equal Employment Opportunity Commission and the subsequent filing of this lawsuit, NWA continued to adhere to that position.<sup>239</sup> No written memorandum on the subject was prepared or received by the company, although it may have been provided oral advisories by a trade association.<sup>240</sup> The witness had no recollection that NWA ever conferred with outside counsel on the subject, and he did not specifically mention any sort of legal advice at all.<sup>241</sup> We have not been referred to, nor have we discovered, any other evidence bearing on the subject. We think the witness' testimony amply sustains the District Court's finding that NWA "was fully aware of the Equal Pay Act and adopted a deliberate and knowing course of conduct despite its awareness."<sup>242</sup>

NWA asserts, however, that the facts found are legally insufficient to enable the conclusion that the violation was "willfull." It argues for an interpretation of the term which would require bad purpose or evil intent,<sup>243</sup> which the District Court's findings disclaimed.<sup>244</sup> We have de-

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<sup>237</sup> J.App. 1478.

<sup>238</sup> J.App. 1478-1479.

<sup>239</sup> J.App. 1479.

<sup>240</sup> J.App. 1477-1478.

<sup>241</sup> J.App. 1477-1478.

<sup>242</sup> See text *supra* at note 234.

<sup>243</sup> See text *supra* at note 210.

<sup>244</sup> See text *supra* at note 234.

clined acceptance of that definition of willfullness,<sup>245</sup> and in our view of the most that willfullness involves<sup>246</sup> we are satisfied that the necessary elements are present here. NWA not only knew of the Equal Pay Act and its content but also correctly understood its prohibition on different salary levels for men and women performing substantially similar work. With little or nothing beyond internal consideration by laymen—even after the present legal challenge got under way—the company consciously though erroneously concluded that its treatment of pursers and stewardesses was unaffected by the Act. We deem that sufficient to comprise willfullness; in the District Court's words, "[t]he conduct of the Company in the exercise of that judgment was willfull."<sup>247</sup> For reasons already extensively articulated,<sup>248</sup> we agree.

It is also contended by NWA that the District Court was logically inconsistent in finding that the Equal Pay Act violation occurred in good faith<sup>249</sup> and in also finding that the violation was willfull. This claim is of a piece with NWA's insistence that willfullness is inextricably tied to bad purpose.<sup>250</sup> We have said that it is not;<sup>251</sup> we have equated willfullness, rather, with conduct which is conscious and voluntary in character.<sup>252</sup> It follows that a practice may be deliberate, and thus willfull, notwithstanding motivation that is honest. Even if NWA pur-

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<sup>245</sup> See text *supra* at notes 229-232.

<sup>246</sup> See note 230 *supra*.

<sup>247</sup> See text *supra* at note 234.

<sup>248</sup> See text *supra* at notes 214-232.

<sup>249</sup> See Part V (B) *infra*.

<sup>250</sup> See text *supra* at note 243.

<sup>251</sup> See text *supra* at notes 214-232.

<sup>252</sup> See text *supra* at notes 229-232.

sued in good faith the policies which the District Court held to be unlawful, its conduct was willfull within the meaning of the limitation provision.

### B. Good Faith

To each affected employee, an employer infringing the Equal Pay Act is statutorily liable, in consequence of its interrelationship with the Fair Labor Standards Act,<sup>253</sup> not only for unpaid compensation but also for "an additional equal amount as liquidated damages."<sup>254</sup> The predicate for the latter imposition is the reality that "[t]he retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."<sup>255</sup> Originally mandatory in its provision,<sup>256</sup> the statutory provision on liquidated damages was amended in 1947 to confer discretion on the courts to deny otherwise awardable liquidated damages in whole or part when satisfied that the employer acted or omitted action "in good faith and that he had reasonable grounds for believing that his act or omission was not a violation. . . ." <sup>257</sup> In the instant case, the District Court so found:

<sup>253</sup> See note 88 *supra* and accompanying text.

<sup>254</sup> "Any employer who violates the provisions of [the Fair Labor Standards Act] shall be liable to the employee or employees affected in the amount of the unpaid minimum wages, or unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (1970).

<sup>255</sup> *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-584, 62 S.Ct. 1216, 1222-1223, 86 L.Ed. 1682, 1690-1691 (1942).

<sup>256</sup> See text *infra* at notes 264-270.

<sup>257</sup> "[I]f the employer shows to the satisfaction of the court that the act or omission giving rise [to the violation] was in good faith and that he had reasonable grounds for believ-

[NWA] did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: The traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardess' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point.<sup>258</sup>

The good faith of which the Act speaks is "an honest intention to ascertain what the . . . Act requires and to act in accordance with it."<sup>259</sup> That necessitates a subjective inquiry.<sup>260</sup> The statutory call for reasonable grounds for a belief in compliance with the Act imposes a requirement additional to good faith,<sup>261</sup> and one that involves an objective standard.<sup>262</sup> Any assessment of an

ing that his act or omission was not a violation of [the Act] as amended, the court may, in its sound discretion, award no liquidated damages or award any amounts thereof not to exceed the amount specified in" § 216(b), *supra* note 254. 29 U.S.C. § 260 (1970).

<sup>258</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

<sup>259</sup> *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877, 74 S.Ct. 120, 98 L.Ed. 384 (1953).

<sup>260</sup> *Id.* at 93.

<sup>261</sup> *Id.* See also note 268 *infra*.

<sup>262</sup> *Addison v. Huron Stevedoring Corp.*, *supra* note 259, 204 F.2d at 93.

employer's good faith or grounds for his belief in the legal propriety of his conduct is necessarily a finding of fact, to be disturbed on appeal only if clearly erroneous.<sup>263</sup> In the case at bar, however, it is clear enough that the District Court relied on factors not supportive of its conclusion. Accordingly, we must remand for re-determination of the issue.

The current version of the liquidated damages provision was enacted in response to the Supreme Court's "lament" in *Overnight Motor Transportation v. Missel*<sup>264</sup> of the then mandatory nature of the judicial duty respecting liquidated damages.<sup>265</sup> In that case, the fact that an employer was not exempt from the Fair Labor Standards Act's coverage did not plainly emerge until after the employment in question had ended. The Court expressed sympathy for the employer but concluded nevertheless:

Perplexing as [the employer's] problem may have been, the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute, and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages . . . are compensation, not a penalty or punishment by the Government. . . . The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.<sup>266</sup>

<sup>263</sup> Fed.R.Civ.P. 52(a); *Addison v. Huron Stevedoring Corp.*, *supra* note 259; *Hodgson v. Miller Brewing Co.*, *supra* note 135, 457 F.2d at 228; *Day & Zimmerman v. Reed*, 168 F.2d 356, 360 (8th Cir. 1948); *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984, 993, 21 A.L.R.2d 1313 (9th Cir. 1949).

<sup>264</sup> *Supra* note 255.

<sup>265</sup> Portal-to-Portal Act, H.R. Rep. No. 71, at 7-8 (1947).

<sup>266</sup> 316 U.S. at 583-584, 63 S.Ct. at 1222-1223, 86 L.Ed. at 1690-1691.

Congress reacted by an amendment conferring the present discretion on the courts to limit or deny liquidated damages if the employer could meet the "substantial burden"<sup>267</sup> of proving that his failure to comply was in good faith and also was predicated on reasonable grounds for a belief that he was in compliance.<sup>268</sup> If the employer cannot convince the court in these respects, an award of liquidated damages remains mandatory;<sup>269</sup> and even if

<sup>267</sup> *Rothman v. Publicker Indus., Inc.*, 201 F.2d 618, 620 (3d Cir. 1953).

<sup>268</sup> 29 C.F.R. § 790.22(b) (1975), provides:

The conditions prescribed as prerequisites to [the court's denial of liquidated damages] are two: (1) The employer must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. . . . If, . . . the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages (footnote omitted).

*Rothman v. Publicker Indus., Inc.*, *supra* note 267, 201 F.2d at 620 (under the Portal-to-Portal Act, a delinquent employer seeking to escape payment of liquidated damages has "a plain and substantial burden of persuading the court that his failure to obey the [Fair Labor Standards Act] was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict."). See also *Wright v. Carrig*, 275 F.2d 448 (4th Cir. 1960); *McClanahan v. Matthews*, 440 F.2d 320, 322-323, 26 A.L.R. Fed. 598 (6th Cir. 1971). Cf. *National Automatic Laundry & Cleaning Council v. Shultz*, *supra* note 127, 143 U.S.App.D.C. at 282 & n.6, 443 F.2d at 697 & n.6, and see generally Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 Ark. L. Rev. 328, 347-354 (1975).

<sup>269</sup> *McClanahan v. Matthews*, *supra* note 268, 440 F.2d at 323; *Thomas v. Louisiana*, 348 F.Supp. 792 (W.D. La. 1972);

the employer's presentation is persuasive the court may still exercise its discretion to grant liquidated damages totally or partially.<sup>270</sup>

Examined against this background, the reasons given by the District Court for disallowing liquidated damages betray their legal inadequacy.<sup>271</sup> That an employer and others in the industry have broken the law for a long time without complaints from employees is plainly not the reasonable ground to which the statute speaks.<sup>272</sup> Nor is it enough that it appear that the employer probably did not act in bad faith; he must affirmatively establish that he acted both in good faith and on reasonable grounds.<sup>273</sup> That duty is accentuated here, where the prevalence of sex-discrimination litigation against the airline industry<sup>274</sup> naturally prompts the question whether

29 C.F.R. § 790.22(b) (1974); *contra*, *Baird v. Wagoner Transp. Co.*, 18 Wage & Hour Cas. 597 (W.D.Mich. 1968), *aff'd*, 425 F.2d 407 (6th Cir.), *cert. denied*, 400 U.S. 829, 91 S.Ct. 58, 27 L.Ed.2d 59 (1970).

<sup>270</sup> *McClanahan v. Matthews*, *supra* note 268, 440 F.2d at 322-324.

<sup>271</sup> The court's ruling on liquidated damages has been characterized as one "of particular interest and very doubtful correctness." Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 Ark. L. Rev. 328, 352 (1975). The degree to which Congress' 1947 modification may have changed the character of liquidated damages from compensatory to punitive allowances is a matter we need not now decide. See generally *id.* at 348-350; *Russell v. American Tobacco Co.*, 528 F.2d 357, 366 (4th Cir. 1975), *cert. denied*, — U.S. —, 96 S.Ct. 1667, 48 L.Ed.2d 176 (1976).

<sup>272</sup> See note 268 *supra*.

<sup>273</sup> See note 268 *supra*.

<sup>274</sup> *E.g.*, *Ponds v. Braniff Airways*, 500 F.2d 161 (5th Cir. 1974); *Airline Stewards & Stewardess' Ass'n, Local 550, v. American Airlines*, 490 F.2d 636 (7th Cir. 1973), *cert. de-*

NWA should reasonably have known that neither its own tradition, the industry custom nor the employees' silence was a reliable indicium of the demands of the law.<sup>275</sup> We need not inquire whether business custom or employee acquiescence might in particular circumstances explain why an otherwise punctilious employer did not investigate his situation more thoroughly, for in any event they do not provide a reasonable foundation for a positive belief that in fact there is compliance.

We share with the District Court the view that ambiguous or complex legal requirements may provide reasonable grounds for an employer's good faith but erroneous belief that he is in conformity with the Act.<sup>276</sup>

*nied*, 416 U.S. 993, 94 S.Ct. 2406, 40 L.Ed.2d 773 (1974); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971); *Gerstle v. Continental Airlines*, 358 F.Supp. 545 (D. Colo. 1973); *Cooper v. Delta Airlines*, 274 F.Supp. 781 (E.D. La. 1967); *Defiguernedo v. Trans World Airlines*, 322 F.Supp. 1384 (S.D.N.Y. 1976); *Maguire v. Trans World Airlines*, 55 F.R.D. 48 (S.D.N.Y. 1972).

<sup>275</sup> Employee silence is very different from an absence of complaint by Department of Labor officials following examination of the employer's system. See *Retail Store Employees Union, Local 400 v. Drug Fair Community Drug Co.*, 307 F.Supp. 473, 479-480 (D.D.C. 1969); *Hodgson v. Barge, Wagoner & Sumner, Inc.*, *supra* note 208, 377 F.Supp. at 1845.

<sup>276</sup> *Van Dyke v. Bluefield Gas Co.*, 210 F.2d 620 (4th Cir.), *cert. denied*, 347 U.S. 1014, 74 S.Ct. 870, 98 L.Ed. 1137 (1954); *General Elec. Co. v. Porter*, 208 F.2d 805 (9th Cir. 1953); *Harp v. Continental/Moss-Gordin Gin Co.*, 259 F.Supp. 198 (M.D. Ala. 1966), *aff'd*, 386 F.2d 995 (5th Cir. 1967); *Kelly v. Ballard*, 298 F.Supp. 1301 (S.D. Cal. 1969); *Bauler v. Pressed Steel Car Co.*, 81 F.Supp. 172 (N.D. Ill. 1948), *aff'd*, 182 F.2d 357 (2d Cir. 1950); *Peperissa v. Coren-Indik, Inc.*, 298 F.Supp. 34 (E.D. Pa. 1969).

[Continued]

Indeed, just that sort of employer-predicament was the concern of Congress when it enacted the 1947 amendments.<sup>277</sup> But legal uncertainty, to assist the employer's defense, must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice. While the District Court cited the absence of precise legal guidelines as a factor indicating reasonableness on NWA's part, it made no finding that that condition actually led NWA to believe that it was in compliance with the Equal Pay Act. Furthermore, even when the court finds good faith and a reasonable basis, it retains discretion to award liquidated damages.<sup>278</sup> We cannot say that the District Court's decision to deny such damages would have been reached had it known that any of the five factors upon which it relied would not survive scrutiny.<sup>279</sup>

<sup>278</sup> [Continued]

On the other hand, maintenance of a practice of "highly questionable legality" constitutes bad faith. *Albemarle Paper Co. v. Moody*, *supra* note 174, 422 U.S. at 422, 95 S.Ct. at 2374, 45 L.Ed.2d at 299. Lack of reasonable grounds has also been found where an employer waited for an impending Supreme Court decision on the validity of amending legislation, *Thomas v. Louisiana*, *supra* note 269, 348 F.Supp. at 796; where a Supreme Court decision in another case had made it clear that the employer's defense was not valid, *King v. Board of Educ.*, 435 F.2d 295, 298 (7th Cir. 1970), *cert. denied*, 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 649 (1971); where the employer continued a course of conduct after inspectors indicated that it violated the Act, *American Newspaper Guild v. Republican Publishing Co.*, 8 Wage & Hour Cas. 140, *aff'd*, 172 F.2d 943 (1st Cir. 1949); where the employer claimed that he did not know the details of the job in issue, *Day & Zimmerman v. Reid*, *supra* note 263, 168 F.2d at 359-360.

<sup>277</sup> See text *supra* at notes 264-270.

<sup>278</sup> See note 270 *supra* and accompanying text.

<sup>279</sup> In *Crango v. Rockwell Mfg. Co.*, 301 F.Supp. 743 (W.D. Pa. 1969), it was held that "[a]lthough defendant did not

### C. Title VII Recovery Period

On its finding that in particular respects NWA had violated Title VII, the District Court awarded affected employees backpay<sup>280</sup> to remedy the pay discrimination wrought thereby,<sup>281</sup> but limited the recovery period to two years from the date on which charges were filed with the Equal Employment Opportunity Commission.<sup>282</sup> The court explained:

do all that might have been done by a reasonable employer in determining whether it was in compliance with the Act, such as securing from its legal department a reliable opinion incident to plaintiff's employment, and again seeking the advice of the Wage and Hour Division, this circumstance does not preclude defendant from protection under [the liquidated damages provision]." *Id.* at 748. The court then found that the defendant had acted in good faith on reasonable grounds to believe it was not violating the Act, but still awarded partial liquidated damages "representing plaintiff's loss of use of the overtime compensation due him. . . ." *Id.*

The employee litigants also complain that the provision of the judgment on liquidated-damages is ambiguous in one respect and deficient in another. Since we are remanding the matter of liquidated damages in toto for reconsideration by the District Court, to which any further grievance by either side may be addressed, we do not pass on these contentions on this appeal.

<sup>280</sup> The elements of backpay are the same as for Equal Pay Act plaintiffs. See note 193 *supra*.

<sup>281</sup> The court's judgment also directed NWA to pay the difference between one-half of the value of double rooms provided employees on layovers and the value of a single room had it been provided. *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1386, 1387. NWA was also ordered to pay to eligible Title VII plaintiffs, see note 196 *supra*, a uniform-cleaning allowance, *id.* at 1387, thus matching a similar provision in favor of Equal Pay Act plaintiffs. See text *supra* at note 78.

<sup>282</sup> As we have heretofore observed, there will be no overlapping recovery by anyone entitled to benefit from both

The Court has discretion to award backpay to July 2, 1965,<sup>282</sup> but has chosen to limit that award herein. The 1972 amendment to Title VII<sup>283</sup> . . . limiting backpay liability to not more than two years prior to filing of charges with the [Commission]<sup>284</sup> is not applicable to this case. Nevertheless, it does indicate that Congress felt some limitation is appropriate to avoid "windfall" damage awards and to avoid harsh, and sometimes unbearable, economic burdens upon

Title VII and the Equal Pay Act since in all instances the Title VII backpay recovery is cut off on "the day preceding the commencement of her Equal Pay Act recovery period . . . ." *Id.* at 1386.

<sup>282</sup> This was the effective date of the enforcement provision of Title VII upon which the District Court predicated this aspect of its judgment. See Pub.L. No. 88-352, tit. VII, § 716(a), (b), 78 Stat. 266 (1964).

<sup>283</sup> Prior to the 1972 amendments, there was no statutory limitation upon the period for which Title VII backpay might be awarded. Pub.L. No. 88-352, tit. VII, § 706(g), 78 Stat. 261, 42 U.S.C. § 2000e-5(g) (1970).

<sup>284</sup> 42 U.S.C. § 2000e-5(g) (Supp. II 1972) in relevant part provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful practice), or any other equitable relief as the court deems appropriate. Backpay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Opportunity] Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

the employers. The amendment also indicates that two years is an appropriate and reasonable period for measuring the adequacy of the remedy for the plaintiff. In light of these considerations, the court has, in the exercise of its discretion, limited the recovery period.<sup>285</sup>

Both sides claim error. Two issues must therefore be joined: what statute of limitations applies to pre-1972 Title VII cases, and whether within that limitation the trial judge had discretion further to restrict an award of backpay.

Preliminarily, we note that the District Court was correct in holding that the 1972 amendment inaugurating the two-year limitation on backpay liability does not apply to this case. In the amending legislation, Congress made significant changes in the Equal Employment Opportunity Commission's procedures and expressly provided that "the amendments made by this Act to the enforcement provision of Title VII upon which the District Court's judgment rested "shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."<sup>287</sup> The irresistible inference from this language is that the amendments were not to extend to litigation which on their effective date had proceeded beyond the Commission stage. Here, on that date, the charges by Title VII claimants were no longer before the Commission, and the case was well underway in the courts,<sup>288</sup> and thus was not affected

<sup>282</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1390.

<sup>287</sup> Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, § 14, 86 Stat. 113.

<sup>288</sup> On July 14, 1970, the Commission notified the employees that they were entitled to initiate a civil action, and on July 15, 1970, the complaint was filed in the District Court.

by the new two-year provision.<sup>290</sup>

Even so, both sides have argued from the 1972 amendments in favor of their respective positions on the proper limitation period for pre-1972 cases.<sup>291</sup> Quite apart from the canon that the meaning of legislation cannot be altered by remarks subsequent to its passage,<sup>292</sup> we must construe Title VII on the assumption that Congress did not intend in 1964 to limit liability by later amendment. Thus the employee-parties' contention that backpay may be awarded back to the effective date of the Act<sup>293</sup> seems

<sup>290</sup> See *Bing v. Roadway Express*, 485 F.2d 441, 453 n.14 (5th Cir. 1973); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975).

<sup>291</sup> The employees rely on assertions during legislative consideration of the amendments that the 1964 version permitted backpay retroactively to the effective date of the Act, i.e., that there was no statutory limitation. Their argument based on this congressional spectre-raising is addressed *infra*, text and notes at notes 292, 294.

NWA attempts to persuade us that the absence of a backpay limit in the 1964 Act restricts the District Court's discretion to "the beginning of the period in which Congress stated it was reasonable to expect someone to complain, viz., 90 days before the filing" of the charge with the Commission. Reply Brief of Appellant NWA at 32. Since such a contention would cut the heart out of the well-accepted "continuing violation" theory, see, e.g., *Macklin v. Spector Freight Sys., Inc.*, *supra* note 112, 156 U.S.App.D.C. at 77-78, 478 F.2d at 987-988, we concur in the Fifth Circuit's analysis in *United States v. Georgia Power Co.*, 474 F.2d 906, 922-923 (5th Cir. 1973), in rejecting such a limit. NWA's second contention is directed to support of the District Court's use of the two-year limit specified in the amendments as an index of reasonableness in the exercise of its discretion. That argument too is addressed *infra* at notes 320-321.

<sup>292</sup> *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132, 95 S.Ct. 335, 353, 42 L.Ed.2d 320, 346-347 (1974).

<sup>293</sup> July 2, 1965. Pub. L. No. 88-352, tit. VII, § 716(a), 78 Stat. 266 (1964).

superficially plausible now that the amendments have limited liability measured in that manner to seven years.<sup>294</sup> Absent the amendments, however, such a novel interpretation would have subjected NWA to a potentially unlimited backpay liability. This is not to suggest that Congress considered and put aside such a construction; rather, "the fact that such matters would require thought" leads us ultimately to reject it.<sup>295</sup>

Seen in this light, the problem at this point is simply that of fashioning a federal common law period of limitations.<sup>296</sup> Most often this is effected by adopting the period prescribed by the most analogous state statute.<sup>297</sup> Because of its convenience, and of the notice it presumably affords prospective litigants,<sup>298</sup> adoption of the state limitation period is proscribed only when it would create important conflicts with the federal policy underlying the cause of action,<sup>299</sup> or when it would amount to discrimina-

<sup>294</sup> See 42 U.S.C. § 2000e-5(g) (Supp. II 1972).

<sup>295</sup> Cf. *Manchester Modes, Inc. v. Schuman*, 426 F.2d 629, 633 (2d Cir. 1971).

<sup>296</sup> See generally 2 J. Moore, *Federal Practice* ¶ 3.07[2]-[3] (2d ed. 1948); Note, *Federal Statutes Without Limitations Provisions*, 53 Colum. L. Rev. 68 (1953).

<sup>297</sup> E.g., *Runyon v. McCrary*, — U.S. —, —, 96 S.Ct. 2586, 2599, 49 L.Ed.2d 415, 430-431 (1976); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-704, 86 S.Ct. 1107, 1110-1113, 16 L.Ed.2d 192, 197-199 (1966); *Cope v. Anderson*, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947); *O'Sullivan v. Felix*, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906); *Campbell v. Haverhill*, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895).

<sup>298</sup> See *Johnson v. Railway Express Agency*, *supra* note 112, 421 U.S. at 464, 95 S.Ct. at 1722, 44 L.Ed.2d at 303-304.

<sup>299</sup> See, e.g., *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); cf. *UAW v. Hoosier Cardinal Corp.*, *supra* note 296, 383 U.S. at 701-703, 86 S.Ct. at 1110-1112, 16 L.Ed.2d at 197-198;

tory restriction of a federal right of action.<sup>299</sup> Neither of those conditions exists here. While adoption of relatively short<sup>300</sup> state periods will prevent the fullest possible realization of the compensatory aims of Title VII, such is the inevitable result of any time bar to recovery. Neither the Supreme Court<sup>301</sup> nor this circuit<sup>302</sup> has regarded actions based on civil rights statutes as of such a special nature that recourse to state limitation periods is impermissible, and indeed, as the Supreme Court noted

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Note, Federal Statutes Without Limitations Provisions, 53 Colum. L. Rev. 68 (1953); see generally *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

<sup>299</sup> See *Republic Pictures Corp. v. Kappler*, 151 F.2d 543, 546-547, 162 A.L.R. 228 (8th Cir. 1945), *aff'd*, 327 U.S. 757, 66 S.Ct. 523, 90 L.Ed. 757 (1946), cited with approval in *Johnson v. Railway Express Agency*, *supra* note 112, 421 U.S. at 462 n.7, 95 S.Ct. at 1721 n.7, 44 L.Ed.2d at 302-303 n.7.

<sup>300</sup> The statutes cited to us by the parties contain two- or three-year limits. Since we remand to the District Court for a determination of which provision is appropriate to this case, we have no occasion to decide whether either of these periods is so short as impermissibly to frustrate the federal right of action asserted. We note, however, that other circuits adopting state rules for Title VII have applied periods of about that length. *EEOC v. Detroit Edison Co.*, *supra* note 289, 515 F.2d at 315 (three years); *United States v. Georgia Power Co.*, *supra* note 290, 474 F.2d at 924 (two years). See also *Runyon v. McCrary*, *supra* note 296, — U.S. at —, 96 S.Ct. at 2599-2600, 49 L.Ed.2d at 430-433.

<sup>301</sup> *Johnson v. Railway Express Agency*, *supra* note 112; *O'Sullivan v. Felix*, *supra* note 296.

<sup>302</sup> *Macklin v. Spector Freight Sys., Inc.*, *supra* note 112, 156 U.S.App.D.C. at 85 n.30, 478 F.2d at 985 n.30.

recently,<sup>303</sup> such a result may be required by federal statute.<sup>304</sup> Nothing about Title VII serves to distinguish it from those statutes; indeed, other circuits have invoked state rules to govern Title VII litigation.<sup>305</sup> On remand, the District Court must determine the local statute of limitations most appropriate to this case,<sup>306</sup> and its pro-

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<sup>303</sup> *Johnson v. Railway Express Agency*, *supra* note 112, 421 U.S. at 464, 95 S.Ct. at 1722, 44 L.Ed.2d at 303-304.

<sup>304</sup> 42 U.S.C. § 1988 (1970), which provides:

The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

Section 1988 is a product of the Reconstruction-era civil rights acts, and as such controls by its terms only rights of action predicated upon those statutes, *e.g.*, 42 U.S.C. §§ 1981-1983, 1985-1992 (1970). Without deciding whether § 1988 dictates recourse to state law in Title VII cases, we note that one court has so held. *Claiborne v. Illinois Cent. R.R.*, 401 F.Supp. 1022, 1026 (E.D. La. 1975) (applying state law on damages). But see *Rogers v. Exxon Research & Eng'g Co.*, 404 F.Supp. 324, 333 (D. N.J. 1975).

<sup>305</sup> See cases cited *supra* note 300.

<sup>306</sup> This is normally determined by reference to the law of the forum state. *United States v. Georgia Power Co.*, *supra* note 290, 474 F.2d at 923; 2 J. Moore, *Federal Practice* ¶ 3.07[2] (2d ed. 1948). See also *Runyon v. McCrary*, *supra* note 296, — U.S. at —, 96 S.Ct. at 2599-2600, 49 L.Ed.2d at 430-433.

visions will serve as the outermost limit on awards of Title VII backpay.

The question, then, is whether the trial judge has discretion to shorten, within the statutory limits, the recovery period and, if so, whether it was properly exercised in this case. Unquestionably, the judge has discretion as to whether to award backpay, but that discretion is limited to exercises faithful to the goals of Title VII. Recently in *Albemarle Paper Co. v. Moody*,<sup>307</sup> the Supreme Court, called upon to clarify this discretionary power, noted that the "District Court's decision must be measured against the purposes which inform Title VII."<sup>308</sup> After observing that Congress patterned the backpay provision after a comparable provision in the National Labor Relations Act, and that Congress presumably was aware that backpay thereunder had been administratively awarded as a matter of course,<sup>309</sup> the

<sup>307</sup> *Supra* note 174.

<sup>308</sup> *Albemarle Paper Co. v. Moody*, *supra* note 174, 422 U.S. at 417, 95 S.Ct. at 2371, 45 L.Ed.2d at 296.

<sup>309</sup> "The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer," *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (CA 2 1965) [*cert. denied*, 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1966)]. While the backpay decision rests in the NLRB's discretion, and not with the courts, *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, [90 S.Ct. 417, 420, 24 L.Ed.2d 405, 410-411] (1969), the Board has from its inception pursued "a practically uniform policy with respect to these orders requiring affirmative action." NLRB, First Annual Report 124 (1936). "[I]n all but a few cases involving discriminatory discharges, discriminatory refusals to employ or reinstate, or discriminatory demotions in violation of section 8(3), the Board has ordered the employer to offer reinstatement to the employee discriminated against and to make whole such employee for any loss of pay that he has suffered by

Court held that "backpay should be denied *only* for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."<sup>310</sup> The presumption in favor of backpay is thus clear, and any denial must be well supported.<sup>311</sup>

While no court seems to have explicitly addressed the question whether there is power to limit as well as deny backpay, we believe the power exists. Justice Marshall, in his concurring opinion in *Albermarle*, assumed its existence; while expressing doubt that prejudice from a delayed request for backpay could be proved, he observed that even if it were shown that an earlier backpay claim would have inspired an "exercise [of] unusual zeal" in litigating the case, that would justify only a reduction in the award of backpay to reflect the earlier date at

reason of the discrimination." NLRB, Second Annual Report 148 (1937).

*Id.* at 420 n.12, 95 S.Ct. at 2373 n.12, 45 L.Ed.2d at 298 n.12.

<sup>310</sup> *Id.* at 421, 95 S.Ct. at 2373, 45 L.Ed.2d at 299 (emphasis added). The Court held that good faith by the employer was no reason to deny backpay to the employee. That result "would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'" *Id.* at 422, 95 S.Ct. at 2372, 45 L.Ed.2d at 299 (footnote omitted). The Court, however, left open the possibility of a denial based on laches; the plaintiffs had initially disclaimed any interest in backpay, asserting their backpay claim for the first time five years after the complaint was filed. *Id.* at 424, 95 S.Ct. at 2374-2375, 45 L.Ed.2d at 300-301.

<sup>311</sup> "It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons." *Id.* at 421 n.14, 95 S.Ct. at 2373 n.14, 45 L.Ed.2d at 299 n.14.

which the court would have awarded it.<sup>312</sup> Such power would also appear to be inherent in the "broad latitude" given district courts in fashioning relief.<sup>313</sup> As Justice Rehnquist stated in his concurring opinion in *Albermarle*,

[i]f the award of backpay is indeed governed by equitable considerations, and not simply a thinly disguised form of damages, factors such as [reasonableness of delay and prejudice resulting], which may argue in favor of or against the equities of either plaintiff or defendants, must be open for consideration by the District Court. . . .<sup>314</sup>

[T]he backpay remedy provided by Title VII is modeled on the remedial provisions of the NLRA. This Court spoke to the breadth of the latter provision in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941), when it said: "[W]e must avoid the rigidities of an either-or rule. The remedy of backpay, it must be remembered, is entrusted to the Board's discretion; it is not mechanistically compelled by the Act. And in applying its authority over backpay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."<sup>315</sup>

<sup>312</sup> *Id.* at 441, 95 S.Ct. at 2384, 45 L.Ed.2d at 311 (Marshall, J., concurring).

<sup>313</sup> *Id.* at 443-444, 95 S.Ct. at 2385, 45 L.Ed.2d at 313 (Rehnquist, J., concurring); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

<sup>314</sup> 422 U.S. at 446-447, 95 S.Ct. at 2387, 45 L.Ed.2d at 314-315.

<sup>315</sup> *Id.* at 444, 95 S.Ct. at 2385, 45 L.Ed.2d at 313. The description of the purpose behind the 1972 revision of the backpay provision emphasized the court's discretion. Senator Williams said the provision was

[Continued]

Nevertheless, the power to limit backpay is subject to restraints. As a partial denial of backpay, authority to limit must be as narrowly constrained as authority to totally deny; its exercise, therefore, must be supported by reasons faithful to the dual purpose attributed to the backpay remedy by the *Albermarle* Court. Firstly, a "reasonably certain prospect of a backpay award '[provides] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" <sup>316</sup> Secondly, backpay "make[s] persons whole for injuries suffered on account of unlawful employment discrimination."<sup>317</sup>

<sup>315</sup> [Continued]

to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible. In dealing with the present section 706(g) [42 U.S.C. § 2000e-5(g)] the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of but also requires that the consequence and effects of the unlawful employment practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. This broad reading of the need for effective remedies under this subsection is intended to be preserved in this bill in order to effectively combat the presence of employment discrimination.

Section-by-section analysis of S. 2515 by Senator Williams, 118 Cong.Rec. 4942 (1972); see also his statement *id.* at 7168.

<sup>316</sup> 422 U.S. at 417-418, 95 S.Ct. at 2371-2372, 45 L.Ed.2d at 296-297, quoting *United States v. N. L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

<sup>317</sup> 422 U.S. at 418, 95 S.Ct. at 2372, 45 L.Ed.2d at 297.

By these standards, we deem the reasons given by the District Court inadequate. The fact that Congress decided to limit the recovery period for future backpay actions is not a sound basis for limiting the period in this action, for Congress deliberately chose not to apply the limitation to cases already in the courts.<sup>318</sup> Moreover, this generalized reason does not reflect consideration of the particular circumstances of the case. And while the court's second statement—that the two-year period appropriately measures the backpay recovery here—may indicate a focus on the equities of this case, it is not sufficiently detailed to permit competent review.<sup>319</sup> We are mindful of *Albermarle's* admonition that

the courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.<sup>320</sup>

Accordingly, we remand to allow the District Court to reconsider, in light of *Albermarle* and this opinion, the need to limit the backpay remedy here.<sup>321</sup>

<sup>318</sup> See *id.* at 422 n.13, 95 S.Ct. at 2373 n.13, 45 L.Ed.2d at 298 n.13.

<sup>319</sup> See note 311 *supra*.

<sup>320</sup> 422 U.S. at 421-422, 95 S.Ct. at 2373, 45 L.Ed.2d at 299. Since one of the purposes of the two-year limitation was to "preclude the threat of enormous backpay liability which could be utilized to coerce employers and labor organizations into surrendering their fundamental rights to a fair hearing and due process," one may assume that Congress believed cases already in the courts were less in need of such protection. 117 Cong.Rec. 31981 (1971) (statement of Mr. Erlenborn). *Cf.* his remarks *id.* at 26555.

<sup>321</sup> Thus we dispose of NWA's contention that the District Court should have denied backpay entirely or should at

#### D. The Title VII Class

NWA next contends that the District Court erred in granting relief pursuant to Title VII in the form of backpay to stewardesses whose employment with the company terminated more than ninety days prior to the first filing by an employee of an unlawful-employment-practice charge with the Equal Employment Opportunity Commission. The relevant provision of Title VII<sup>322</sup> specifies, as a precondition to a later action in court, that "[a] charge . . . shall be filed [with the Commission] within ninety days after the alleged unlawful employment practice occurred."<sup>323</sup> It now appears settled that not all members of an employee class need file charges with the Commission in order to share in a recovery of backpay;<sup>324</sup> the purposes of the filing requirement—to give notice to the charged party and enable the Commission

least have limited it to only 90 days. With *Rios v. Enterprise Ass'n Steamfitters, Local 638*, 400 F.Supp. 988, 992 (S.D. N.Y. 1975), relying on the District Court's decision in this case to limit an award to two years, we must respectfully disagree.

<sup>322</sup> In 1972, many of the time provisions of the Civil Rights Act of 1964 were expanded. The ninety-day time provision at issue in this case was increased to 180 days and reclassified as 42 U.S.C. § 2000e-5(e) (Supp. II 1972). The amended provision is not applicable to this case. See text *supra* at notes 287-289.

<sup>323</sup> 42 U.S.C. § 2000e-5(d) (1970). That section also sets forth the timing to be observed when the complaining party must file with a state or local agency before filing with the Commission.

<sup>324</sup> In *Albermarle Paper Co. v. Moody*, *supra* note 174, 422 U.S. at 414 n.8, 95 S.Ct. at 2370 n.8, 45 L.Ed.2d at 294 n.8, the Supreme Court indicated its agreement with courts which had considered the issue and had unanimously concluded that backpay might be awarded on a class basis without filings with the Commission by each member.

to conciliate—are adequately served by a timely filing by any member of the class.<sup>325</sup>

That filing, it seems clear, however, cannot revive claims which are no longer viable at the time of the filing.<sup>326</sup> Any other result would produce an anomaly. Time-barred members could not press their claims individually either before the Commission or judicial tribunals; and surely the employer's liability to them cannot be made to depend upon whether they come into court in a different character. True it is that class actions are liberally permitted in the federal courts,<sup>327</sup> but that procedural device cannot be used to expand substantive rights.<sup>328</sup> Not surprisingly, then, courts which have con-

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<sup>325</sup> "The purpose of [the filing requirement] is to provide for notice to the charged party and to bring to bear the voluntary compliance and conciliation functions of the [Commission]. Also, . . . another important function of filing the charge is to permit the [Commission] to determine whether the charge is adequate. Finally, the charge determines the scope of the alleged violation and thereby serves to narrow the issues for prompt adjudication and decision . . . ."

It is apparent that each of these purposes is served when any charge is filed and a proper suit follows which fairly asserts grievances common to the class to be afforded relief in the court. There can be no claim of surprise in such a situation. . . . '[N]o procedural purpose could be served by requiring scores of substantially identical grievances to be processed through [the Commission] when a single charge would be sufficient to effectuate both the letter and spirit of Title VII.' " *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); see also *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968).

<sup>326</sup> See, e.g., *Cohen v. District of Columbia Nat'l Bank*, 59 F.R.D. 84, 90 (D.D.C. 1972); *Lamb v. United Sec. Life Co.*, 59 F.R.D. 25, 35 n.5 (S.D. Iowa 1972)

<sup>327</sup> Fed.R.Civ.P. 23.

<sup>328</sup> 28 U.S.C. § 2072 (1970), providing in part explicitly that the Federal Rules of Civil Procedure "shall not abridge,

sidered the question directly have uniformly held that only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the litigating class.<sup>329</sup>

It is contended, however, in support of the District Court's inclusion of the disputed class members within its Title VII award, that the Title VII violations complained of were of a continuing nature and thus that all past and present stewardesses could have made timely filings with the Commission when the filing for the class occurred. The District Court concluded that each of the violations was indeed continuing and that none was barred by the ninety-day provision.<sup>330</sup> We agree that where, as here, discrimination is not limited to isolated incidents but pervades a series or pattern of events which continue to within ninety days of the filing of the charge with the Commission, the filing is timely as to all similarly situated employees regardless of when the first discriminatory incident occurred.<sup>331</sup>

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enlarge or modify any substantive right. . . ." See also *United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 771, 85 L.Ed. 1058, 1063 (1941) (discussing the precursor of § 2072, the Act of June 19, 1934, 48 Stat. 1064); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10, 61 S.Ct. 422, 424-425, 85 L.Ed. 479, 482-483 (1941) (same); *Brennan v. Silvergate Dist. Lodge No. 50*, 503 F.2d 800, 804 (9th Cir. 1974).

<sup>329</sup> *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975); *Mather v. Western Air Lines*, 59 F.R.D. 535 (C.D. Cal. 1973); *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 294 (D. Del. 1975); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15-16 (E.D. Pa. 1975).

<sup>330</sup> *Laffey v. Northwest Airlines*, supra note 1, 366 F.Supp. at 790 (Concl. 6).

<sup>331</sup> *Macklin v. Spector Freight Sys., Inc.*, supra note 112, 156 U.S.App.D.C. at 77-78, 478 F.2d at 987-988; *Wetzel v. Liberty Mut. Ins. Co.*, supra note 329, 508 F.2d at 246; *Cox*

NWA does not dispute that the violations here are of a continuing kind. But NWA does contend that the discrimination could not be deemed continuing as to those who left the company's employ more than ninety days prior to the class filing with the Commission. We are in agreement with NWA on that score. A severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any violation which occurred at separation or which may have been continuing up to the date thereof.<sup>332</sup> To hold otherwise would effectively read the timely-filing requirement out of the statute.<sup>333</sup>

It is said, however, that NWA is estopped from asserting that employees terminated more than ninety days before the class filing should be excluded from the class recovery because the company was not timely in raising the issue and its untimeliness has prejudiced some individuals within the class. During the course of the proceeding, the District Court ordered class notices to be mailed to all stewardesses who were then or who had been employed by NWA at any time since the effective date of Title VII.<sup>334</sup> The notices informed these employees that they could file consents with the clerk of the court, in which case they would become members of the

v. *United States Gypsum Co.*, 409 F.2d 289, 290-291 (7th Cir. 1969).

<sup>332</sup> *Wetzel v. Liberty Mut. Ins. Co.*, *supra* note 329, 508 F.2d at 246; *Terry v. Bridgeport Brass Co.*, 519 F.2d 806, 808 (7th Cir. 1975); *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1233-1234 (8th Cir. 1975); *Collins v. United Airlines*, 514 F.2d 594, 596-597 (9th Cir. 1975).

<sup>333</sup> *Collins v. United Airlines*, *supra* note 332, 514 F.2d at 596; *Olson v. Rembrandt Printing Co.*, *supra* note 332, 511 F.2d at 1234.

<sup>334</sup> J.App. 61-63.

classes for Equal Pay Act and Title VII relief.<sup>335</sup> The notices also advised that in the event that no consent was filed, the recipient "would be entitled to share in any money award which the court grants under the Civil Rights Act."<sup>336</sup> The employees alleged to have been prejudiced by NWA's omission to raise the issue at the time the class was certified and the notices were mailed, are those who, if they had filed consents with the court, could have recovered under the Equal Pay Act but who did not so file.<sup>337</sup> Had these employees been informed that they could not recover under Title VII and that therefore their failure to file consents would preclude them from any recovery, whatever, so the argument runs, they might have filed consents in order to obtain at least partial recovery of backpay pursuant to the Equal Pay Act.

If compliance with the ninety-day charge-filing requirement is jurisdictional, there can be no estoppel. Parties cannot waive subject matter jurisdiction by their conduct or confer it on the court by consent,<sup>338</sup> and the

<sup>335</sup> J.App. 67-71. There was also a notice which was sent only to individuals whose employment terminated prior to a designated date. J.App. 63-67. That notice informed recipients of the class action and of their automatic inclusion in the Title VII class unless they opted to be excluded from the litigation. Those individuals could not share in the Equal Pay Act recovery because their respective claims were barred by the Act's statute of limitations. See note 199 *supra* and accompanying text.

<sup>336</sup> J.App. 69.

<sup>337</sup> This group can consist only of those whose employment with NWA was terminated between the earliest possible recovery date for Equal Pay Act violations and ninety days before the filing of charges with the Commission. Those who left the company's employ between those dates would be barred from a Title VII recovery but not from an Equal Pay Act recovery had they filed the consents.

<sup>338</sup> See, e.g., *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18, 71 S.Ct. 534, 541-542, 95 L.Ed. 702, 710-711 (1951);

absence of such jurisdiction can be raised at any time.<sup>330</sup> On the other hand, if timely filing with the Commission is not a jurisdictional step but is to be analogized to a statute of limitations, then an estoppel might possibly arise.<sup>330</sup>

The courts have not been uniform in their concept of the ninety-day period. Although the Supreme Court and this court—like most others—have referred to the timely-filing requirement as a jurisdictional prerequisite,<sup>331</sup> neither has ever had occasion to focus on the question whether courts are precluded from invoking traditional equitable doctrines to modify the requirement. When the issue has been considered, most courts have concluded

*Ahrens v. Clark*, 335 U.S. 188, 193, 68 S.Ct. 1443, 1445-1446, 92 L.Ed. 1898, 1901-1902 (1948); *United States v. Griffin*, 303 U.S. 226, 229, 58 S.Ct. 601, 602-603, 82 L.Ed. 764, 766-767 (1938); *Green v. Obergfell*, 73 App.D.C. 298, 306-307, 121 F.2d 46, 54-55, cert. denied, 314 U.S. 637, 62 S.Ct. 72, 86 L.Ed. 511 (1941).

<sup>330</sup> See, e.g., *Flast v. Cohen*, 392 U.S. 83, 88 n.2, 88 S.Ct. 1942, 1946 n.2, 20 L.Ed.2d 947, 955 n.2 (1968); *United States v. Griffin*, supra note 338, 303 U.S. at 229, 58 S.Ct. at 602-603, 82 L.Ed. at 766-767; *Fortier v. New Orleans Nat'l Bank*, 112 U.S. 439, 444, 5 S.Ct. 234, 236, 28 L.Ed. 764, 765-766 (1884); *James v. Lusby*, 162 U.S.App.D.C. 352, 356, 499 F.2d 488, 492 (1974).

<sup>331</sup> *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959), where a limitation period was contained in the statute creating a new right, and thus historically was to be seen as a limitation on the right itself, and the Court held that the defendant could be estopped from asserting the limitation as a defense.

<sup>332</sup> See *Alexander v. Gardner-Denver Co.*, supra note 96, 415 U.S. at 47, 94 S.Ct. at 1019, 39 L.Ed.2d at 157-158; *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 798, 93 S.Ct. 1817, 1822, 36 L.Ed.2d 668, 675-676 (1973); *Macklin v. Spector Freight Sys., Inc.*, supra note 112, 156 U.S.App. D.C. at 76, 478 F.2d at 986.

that equitable principles can be used to extend the time period in deserving cases.<sup>332</sup> Thus several circuits have held that since private settlement of claims is a major goal of Title VII and the pursuit of contractual grievance procedures furthers that goal, the time provision is tolled while an employee pursues his contractual grievance remedies.<sup>333</sup> Similarly, the Fifth Circuit has stated that the time limitation must sometimes be modified to further the broad remedial purposes of Title VII. It held that the ninety-day period did not start until the facts supporting the charge of discrimination would or should have been known to an employee "with a reasonably prudent regard for his rights similarly situated to the plaintiff."<sup>334</sup>

<sup>332</sup> *Reeb v. Economic Opportunity, Atlanta Inc.*, 516 F.2d 924 (5th Cir. 1975); *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), aff'd in part and rev'd in part, — U.S. —, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970); *Malone v. North Am. Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Sanchez v. Trans World Airlines*, 499 F.2d 1107 (10th Cir. 1970).

<sup>333</sup> See, e.g., *Sanchez v. Trans World Airlines*, supra note 342; *Moore v. Sunbeam Corp.*, 459 F.2d 811, 826-827 (7th Cir. 1972); *Malone v. North Am. Rockwell Corp.*, supra note 342; but see, *Guy v. Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975), cert. granted, — U.S. —, 96 S.Ct. 1723, 48 L.Ed.2d 193 (1976).

<sup>334</sup> *Reeb v. Economic Opportunity, Atlanta Inc.*, supra note 342, 516 F.2d at 931. In reaching its decision the court relied in part on a prior decision of the Fifth Circuit, *Franks v. Bowman Transp. Co.*, supra note 342, wherein the court held that constructive receipt of a "right to sue" letter was inadequate to start the running of the time period within which the claimant had to file his court action. The court ruled that only actual notice would set the time period in motion because "Congress did not intend to condition a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute." 495 F.2d at 404.

We need not indicate a view on specific equitable modifications which the courts have seen fit to make. But we are in accord with the principle that the time provisions of Title VII are subject to equitable modification. Nothing in the legislative history compels us to treat those provisions as jurisdictional; on the contrary, the legislative history, although very limited on the time provisions, suggests that Congress intended them to operate similarly to statutes of limitations.<sup>343</sup> Therefore, to modify these time provisions to serve the dictates of sound equitable considerations would not seem to be inconsistent with congressional intent.

Equally importantly, where congressional purpose is unclear, courts have traditionally resolved ambiguities in remedial statutes in favor of those whom the legislation was designed to protect.<sup>344</sup> As the Supreme Court has declared, procedural "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."<sup>347</sup> In-

<sup>343</sup> Senator Case, one of the floor managers in the Senate of the House bill, H.R. 7152, stated that the six-month limit on filing with the Commission contained in that bill was "to avoid the pressing of 'stale' claims." 110 Cong.Rec. 7243 (1964). Senator Humphrey, commenting on the differences between H.R. 7152 and the substitute Senate bill, S. 656, which was eventually passed by the Senate, referred to its ninety-day time period as a "period of limitations." *Id.* at 12723.

<sup>344</sup> *Beverly v. Lone Star Lead Constr. Corp.*, 437 F.2d 1136, 1138 (5th Cir. 1971); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970); *Harris v. Walgreen's Dist. Center*, 456 F.2d 588, 591 (6th Cir. 1972).

<sup>347</sup> *Love v. Pullman*, 404 U.S. 522, 527, 92 S.Ct. 616, 619, 30 L.Ed.2d 679, 685 (1972). As we have already noted, the Supreme Court has held that not all members of a class need to individually file with the Commission. See note 324 *supra*. This is some indication that the Court does not regard the act of filing as a jurisdictional prerequisite.

deed, only recently, in *Coles v. Penny*,<sup>348</sup> we ourselves observed that provisions in Title VII "require an interpretation animated by the broad humanitarian and remedial purposes underlying the federal proscription of employment discrimination."<sup>349</sup> While we declined in *Coles* to determine whether Title VII's time provisions are jurisdictional or nonjurisdictional, we cited with approval cases which have permitted equitable modifications of those provisions.<sup>350</sup> We hold that Title VII's ninety-day provision for the filing of charges with the Commission is not a jurisdictional absolute.<sup>351</sup>

We now return to the question whether NWA is estopped from raising the defense of untimeliness of the filing of charges in this case. NWA conceded in the Dis-

<sup>348</sup> *Supra* note 228.

<sup>349</sup> *Coles v. Penny*, *supra* note 228, — U.S.App.D.C. at —, 531 F.2d at 616 (footnote omitted).

<sup>350</sup> *Id.*

<sup>351</sup> Our holdings find support in the interpretation the courts of appeals have uniformly given to comparable time provisions in the National Labor Relations Act, 29 U.S.C. § 160(b) (1970). Section 160(b) provides in part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." The courts that have construed this provision have all concluded that it is a statute of limitations, not a limitation on the jurisdiction of the National Labor Relations Board. See *NLRB v. A. E. Nettleton Co.*, 241 F.2d 130, 133 (2d Cir. 1957); *Shumate v. NLRB*, 452 F.2d 717, 720 (4th Cir. 1971); *NLRB v. Itasco Cotton Mfg. Co.*, 179 F.2d 504, 506-507 (5th Cir. 1950); *NLRB v. Local 264, Laborers' Int'l Union*, 529 F.2d 778, 781-785 (8th Cir. 1976). The analogy to the National Labor Relations Act is particularly significant in light of the Supreme Court's reliance on it when interpreting Title VII. *Franks v. Bowman Transp. Co.*, *supra* note 342, — U.S. at —, 96 S.Ct. at 1267, 47 L.Ed.2d at 465-466; *Albermarle Paper Co. v. Moody*, *supra* note 174, 422 U.S. at 419-421, 95 S.Ct. at 2372-2373, 45 L.Ed.2d at 297-299.

strict Court that through inadvertence it had omitted to defensively plead the ninety-day provision as a statute of limitations.<sup>332</sup> Even now, NWA does not claim that it posed any objection on account of that provision prior to trial.<sup>333</sup> By the time NWA raised the issue of untimeliness, notice had already gone out to class members informing them that they need not do anything to join in any recovery which the court might order under Title VII. It is evident that some members may have been lulled into inaction on their Equal Pay Act rights in the understanding that they would share in any Title VII recovery. It would be inconsistent with the broad remedial purposes of Title VII to foreclose them from recovery thereunder. We conclude, then, that while the District Court on remand must exclude from the Title VII recovery those employees whose connection with NWA was dissolved more than ninety days before the class filing with the Commission, the court must retain in the class for the Title VII recovery those employees who could have brought themselves within the Equal Pay Act class by filing consents.

#### E. Longevity

The last remedy-issue raised by NWA is that the District Court erred in equating longevity with seniority for pay purposes. The court's judgment provides for (a) salaries, as prescribed in the purser pay-scale, for all female cabin attendants, "[t]he longevity of each . . . for purposes of applying the purser pay scale [to] be her system seniority,"<sup>334</sup> and (b) backpay for both the

<sup>332</sup> Trial Tr. at 3571.

<sup>333</sup> Company-Appellants Combined Reply Brief and Brief on Cross-Appeal at 31.

<sup>334</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 374 F.Supp. at 1385.

Equal Pay Act and the Title VII plaintiffs, calculated at "the difference between the salary actually paid to her . . . and the salary . . . which would have been paid to her had she been compensated as a purser with longevity for pay purposes equal to her system seniority."<sup>335</sup> NWA insists that longevity and seniority are computed differently—longevity as representing the days of actual service and seniority as merely reflecting the hiring date—and that longevity rather than seniority fixes the appropriate step on the salary schedule. NWA's contention is not disputed. It is argued, however, that NWA should have raised the point before the judgment was entered, and not by a post-judgment motion, and that there is no evidence in the record to either support or refute NWA's position. But we must remand this case anyway, and we discern no reason why the District Court should not then afford NWA an opportunity to prove its point. Since no one was prejudiced by NWA's somewhat delayed objection, reconsideration of the matter would better serve the ends of justice. And since a quick look at the collective bargaining agreement should answer the question, no additional delay should be entailed. The remedial order in this case is to make employees whole, but not more than whole.

#### VI. THE UNIONS

After entry of the District Court's judgment, NWA moved, pursuant to Civil Rule 15(b),<sup>336</sup> to amend its answer by inclusion of a request for realignment of the Air Line Pilots Association, International (ALPA) from a non-aligned party status to a defendant; and to assert a cross-claim demanding contribution or indemnification from ALPA for any liability NWA might have to em-

<sup>335</sup> *Id.* at 1385-1386.

<sup>336</sup> Fed.R.Civ. P. 15(b), quoted in relevant part *infra* text at note 364.

ployees under the Equal Pay Act or Title VII, and a claim for damages under the Equal Pay Act for allegedly causing NWA to violate it. NWA also moved, pursuant to Civil Rule 14(a),<sup>357</sup> for leave to serve a third-party complaint on the Transport Workers Union of America (TWU), seeking similar relief from that union.

At the time the instant suit began, TWU was the certified bargaining representative of NWA's cabin attendants. Later, its status as such was challenged and ALPA became the certified representative. NWA's motions were filed almost four years after the action was commenced, more than three years after NWA had answered the complaint, almost one and one-half years after trial was completed and, as previously indicated, several months after the court rendered its findings and judgment. The District Court denied both motions<sup>358</sup> and NWA appeals the denials.

Rule 14(a) specifies the manner in which a third party may be impleaded by a defendant.<sup>359</sup> If the third-party complaint is filed within ten days of the defendant's answer, leave of the court is not required, but after that the defendant must obtain leave.<sup>360</sup> The decision on the motion resides in the trial court's discretion

<sup>357</sup> Fed.R.Civ. P. 14(a), quoted in relevant part *infra* note 359.

<sup>358</sup> J.App. 339-340.

<sup>359</sup> "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. . . ." Fed.R.Civ. P. 14(a).

<sup>360</sup> See note 359 *supra*.

and our role is to review simply for abuse or legal error.<sup>361</sup> The denial of the motions here clearly was neither.

Instead of effectuating the purposes of Rule 14—avoiding circuity of actions<sup>362</sup>—a grant of the motions would have defeated that goal. To have reopened the litigation at the point NWA sought it would not only have been judicially uneconomical but would also have inflicted a hardship on the parties. NWA has established no excuse for the long delay in attempting to bring TWU into the case.<sup>363</sup>

<sup>361</sup> *General Taxicab Ass'n v. O'Shea*, 71 App.D.C. 327, 329, 109 F.2d 671, 673 (1940); *Farmers & Merchants Mut. Life Ins. Co. v. Pulliam*, 481 F.2d 670 (10th Cir. 1973); *Kopan v. George Washington Univ.*, 67 F.R.D. 36, 38 (D.D.C. 1975). See *East Hampton DeWitt Corp. v. State Farm Mut. Auto Ins. Co.*, 490 F.2d 1234, 1246 (2d Cir. 1973). Cf. *Southern Ry. Co. v. Fox*, 339 F.2d 560, 563 (5th Cir. 1964).

<sup>362</sup> *Merritt-Chapman & Scott Corp. v. Frazier*, 289 F.2d 849, 856 (9th Cir.), *cert. denied*, 368 U.S. 835, 82 S.Ct. 60, 7 L.Ed.2d 36 (1961); *United States Fidelity & Guar. Co. v. Perkins*, 388 F.2d 771, 773 (10th Cir. 1968); *Kopan v. George Washington Univ.*, *supra* note 361, 67 F.R.D. at 38. See generally 3 J. Moore, *Federal Practice* ¶ 14.04 (2d ed. 1948); 6 C. Wright & A. Miller, *Federal Practice* § 1442 (1971).

<sup>363</sup> Compare *East Hampton DeWitt Corp. v. State Farm Mut. Auto. Ins. Co.*, *supra* note 361, where a defendant attempted to serve a third-party complaint under Rule 14 on the plaintiff in the litigation shortly before the trial date. The motion was denied, and the court found no reason to disturb the ruling of the trial judge, who was found to have acted well within his discretion. *Id.* at 1246. Accord, *Merritt-Chapman & Scott Corp. v. Frazier*, *supra* note 362; *General Elec. Co. v. Irvin*, 274 F.2d 175, 178 (6th Cir. 1960) ("the timeliness of the motion is an urgent factor governing the exercise of [Rule 14] discretion"). Given this case law, it must be said *a fortiori* that a motion under Rule 14(a) made more than a year and a half after the completion of trial and found by the trial judge to be untimely is rarely to be disturbed on appeal.

NWA's effort vis-a-vis ALPA invoked Rule 15(b), which in pertinent part provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."<sup>364</sup> Thus NWA's motion to amend its answer to incorporate a cross-claim against ALPA for contribution or indemnification and a separate claim for damages presumes that these issues were tried by implied consent of the parties. This seems manifestly to be an erroneous assumption. After ALPA was certified as exclusive bargaining representative of the cabin attendants in the stead of TWU, the employees moved to join ALPA as a party "solely for the limited purpose of assuring that the court will have before it all the parties necessary to effectuate relief,"<sup>365</sup> noting explicitly that they "do not contend that ALPA has in any respect violated" the law.<sup>366</sup> Since they deemed ALPA "not responsible for any of the discrimination"<sup>367</sup> alleged, they did not seek to join ALPA as a defendant. By letter to the District Court, NWA advised that it had no objection to the employees' motion, and directed ALPA to indicate how it wished to be aligned with respect to the issues. ALPA responded that it wished to proceed as a non-aligned party as it did not "possess sufficient knowledge or information to align itself on the issues,"<sup>368</sup> and there was no opposition to ALPA's entry as such. At the trial, which extended over a five-week period, counsel for ALPA appeared only on two days—"the first day of trial, and on one other

<sup>364</sup> Fed.R.Civ.P. 15(b).

<sup>365</sup> Supp. App. to Brief of Airline Pilots Association, International at 3-4, hereinafter cited "Supp. App."

<sup>366</sup> Supp. App. 2.

<sup>367</sup> Supp. App. 4.

<sup>368</sup> J.App. 76.

occasion at the close of the trial to indicate a potential desire to present evidence; no further appearance was made and no evidence was presented."<sup>369</sup>

We cannot detect in this scenario any implied consent by ALPA to litigate any issue of liability to NWA. The question whether an issue has been tried by consent is a matter committed largely to the trial court's discretion and will not be reversed except upon a showing of abuse.<sup>370</sup> Clearly there was no abuse here.

<sup>369</sup> *Laffey v. Northwest Airlines*, *supra* note 1, 366 F.Supp. at 764.

<sup>370</sup> Once an issue has been tried by express or implied consent of the parties, Rule 15(b) requires it be treated as if raised by the pleadings. *Rosden v. Leuthold*, 107 U.S.App.D.C. 89, 92, 274 F.2d 747, 750 (1960). Where the question is whether that is the case, however, the essential inquiry is the understanding of the parties as to whether the unpleaded issue was being contested. *MBI Motor Co. v. Lotus East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974). See *Joiner Sys., Inc. v. AVM Corp.*, 517 F.2d 45, 49 (3d Cir. 1975). See also *Kanelos v. Kettler*, 132 U.S.App.D.C. 133, 136-137 n.15, 406 F.2d 951, 954-955 n.15 (1968). The trial judge's answer to that inquiry is reviewable only for abuse of discretion. *Macris v. Sociedad Maritima San Nicolas*, 245 F.2d 708, 711 (2d Cir. 1957), *cert. denied*, 355 U.S. 922, 78 S.Ct. 364, 2 L.Ed.2d 353 (1958); *Cole v. Layrite Prods. Co.*, 439 F.2d 958, 961 (9th Cir. 1971). *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802, 28 L.Ed.2d 77, 87 (1971); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225-226 (1962)—on the discretion enjoyed by the trial judge under Rule 15(a). He is in a far better position than we to determine the understanding under which the parties proceeded. Where the new issue or theory is raised only after trial, courts of appeals have been loathe to overturn the decision of the trial judge that it was not tried by consent. *E.g.*, *Macris v. Sociedad Maritima San Nicolas*, *supra*; *Bettes v. Stonewall Ins. Co.*, 480 F.2d 92, 94 (5th Cir. 1973); *Saalfank v. O'Daniel*, 533 F.2d 325, 330 (6th Cir. 1976). *Cf. Tasty Baking Co. v. Cost of Living Council*, 529 F.2d 1005, 1011 (Temp. Emergency Ct. App. 1975). *Saalfank*, *supra*, is par-

For the reasons articulated herein, we vacate the provisions of the District Court's judgment pertaining to the questions of good faith,<sup>371</sup> recovery period<sup>372</sup> and eligible class-members<sup>373</sup> arising under Title VII, and remand the case to that court for reconsideration thereof. To the extent indicated herein, other matters may appropriately be addressed to the court on remand. In all other respects, we affirm the judgment.

*So ordered.*

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ticularly persuasive here. There the plaintiff sought to realign parties after trial to place a party theretofore liable only as an indemnitor in a position of direct liability. The trial judge's refusal was sustained on appeal, the court noting that though "[i]n certain circumstances Rule 15 . . . may be availed of to permit an amendment after judgment and a realigning of parties . . . this may only be done if all parties have notice of the issues being tried and no prejudice will result." 533 F.2d at 330. Possible prejudice was found in the indemnitor's waiver of jury trial. *Id.* Cf. *Komie v. Buehler Corp.*, 449 F.2d 644, 648 (9th Cir. 1971) (Rule 15(a) motion to amend denied where failure to raise issue earlier prejudiced party vis-a-vis discovery).

<sup>371</sup> See Part V(B) *supra*.

<sup>372</sup> See Part V(C) *supra*.

<sup>373</sup> See Part V(D) *supra*.

**APPENDIX D**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

September Term, 1976

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**No. 74-1791**

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Mary P. Laffey, et al.

v.

Northwest Airlines, Inc., Appellant.  
Air Line Pilots Association, Non-Aligned Party.

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**No. 75-1334**

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Mary P. Laffey, et al., Appellants,

v.

Northwest Airlines, Inc.  
Air Line Pilots Association, Non-Aligned Party.

APPEALS FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, and TAMM and  
ROBINSON, Circuit Judges

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, and in accordance with the opinion of this Court filed herein this date, it is

ORDERED AND ADJUDGED by this Court that the provisions of the District Court's judgment pertaining to the questions of good faith, recovery period and eligible class-members arising under Title VII, are vacated and these cases are remanded to the District Court for reconsideration thereof. To the extent indicated in the Opinion for the Court filed in this case on this date, other matters may appropriately be addressed to the District Court on remand. In all other respects, the judgment of the District Court is affirmed.

Per Curiam

For the Court

/s/ George A. Fisher

George A. Fisher

Clerk

Date: October 20, 1976

Opinion for the Court filed by Circuit Judge Robinson.

**APPENDIX E**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

September Term, 1976

D.C. Civil Action No. 2111-70

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**No. 74-1791**

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MARY P. LAFFEY, *et al.*,

v.

NORTHWEST AIRLINES, INC.,

Appellant.

AIR LINE PILOTS ASSOCIATION,  
Non-Aligned Party.

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**No. 75-1334**

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MARY P. LAFFEY, *et al.*,

Appellants,

v.

NORTHWEST AIRLINES, INC.

AIRLINE PILOTS ASSOCIATION,  
Non-Aligned Party.

Before BAZELON, *Chief Judge*, and TAMM and ROBINSON *Circuit Judges*.

### ORDER

It is ORDERED by the Court, *sua sponte*, that the opinion filed herein on October 20, 1976, be and hereby is amended as follows:

1. On page 15, reset the material on text lines 21-25 as the ending sentence of the preceding paragraph instead of as a separate paragraph.
2. On page 30, text line 1, substitute "[i]nsubstantial" for "[I]nsubstantial."
3. On page 41, text line 13, insert a comma after "found."
4. On page 51, text line following the indented quotation, insert "Act" after "Pay."
5. On page 64, text line 10, remove quotation marks from "lament."
6. On page 71, text line 18, close quotation after "Act."
7. On page 82, at the beginning of the second paragraph of footnote 325, insert quotation marks before "It."
8. On page 85, text line 6, insert comma after "issue."
9. On page 85, text line 13, eliminate comma after "recovery."
10. On page 90, text line 20, substitute "would" for "could."

11. Page 90, footnote 253, line 2, substitute "33" for "31."

*Per Curiam*

For the Court:

/s/ George A. Fisher  
George A. Fisher  
Clerk

Filed: September 8, 1977

APPENDIX F

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

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No. 74-1791

---

MARY P. LAFFEY, *et al.*

v.

NORTHWEST AIRLINES, INC.,

Appellant.

AIRLINE PILOTS ASSOCIATION,  
Non-Aligned Party.

---

No. 75-1334

---

MARY P. LAFFEY, *et al.*,

Appellants,

v.

NORTHWEST AIRLINES, INC.  
AIR LINE PILOTS ASSOCIATION,  
Non-Aligned Party.

Before BAZELON, *Chief Judge*, and TAMM and  
ROBINSON, *Circuit Judges*.

### ORDER

The petition of Northwest Airlines, Inc., for rehearing having been considered in light of the record on appeal, the opinion of this Court herein and the decisions of the Supreme Court of the United States subsequent to the opinion, it is by the Court

ORDERED that the petition for rehearing be and hereby is denied.

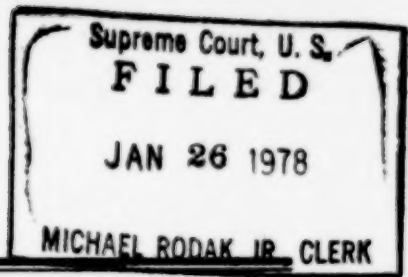
*Per Curiam*

FOR THE COURT

/s/ George A. Fisher  
George A. Fisher  
Clerk

Filed: September 8, 1977

NO. 77-802



IN THE  
**Supreme Court of the United States**

**October Term, 1977**

**NORTHWEST AIRLINES, INC.**

*Petitioner,*

v.

**MARY P. LAFFEY, ET AL.,**

*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit**

---

**BRIEF IN OPPOSITION**

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## IN THE Supreme Court of the United States

October Term, 1977

NO. 77-802

NORTHWEST AIRLINES, INC.

*Petitioner,*

v.

MARY P. LAFFEY, ET AL.,

*Respondents.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

### BRIEF IN OPPOSITION

#### ARGUMENT

##### Introduction

In its apparent zeal to make this case appear worthy of this Court's time and effort, petitioner has found it necessary to put to this Court the case, not as it actually exists, but as petitioner wishes it existed. The facts of this case are set forth in the district court's extensive findings, issued after the court had heard five weeks of testimony and had reviewed thousands of pages of exhibits; those findings take up about fifty-five pages of the appendix to the petition

here. At petitioner's request, many of those findings were reviewed by the court of appeals; the court unanimously affirmed, in a careful opinion covering ninety-six pages of the appendix. Yet, in critical respects, petitioner pretends that the lower courts had not made findings rejecting the factual predicates of arguments petitioner makes here, and pretends as well that certain legal arguments made here for the first time by petitioner's new counsel<sup>1</sup> were properly raised below.

In the sections of this brief that follow, we comment in turn upon each of the six questions petitioner submits for this Court's review, in light of the facts found below. As we demonstrate, there is nothing about this case that is worthy of this Court's plenary consideration.

Before turning to petitioner's six questions, we feel compelled to address certain general misimpressions that might result from petitioner's inaccurate and selective recitation of what this case is about.

From the various assertions contained in the petition's "Statement," the reader could be expected to assume that each of the following propositions is true: First, Northwest regularly employs "male 'flight service attendants' ('FSA's'), now called 'stewards' " at the same rate of pay as "female 'stewardesses.' " Petition (hereinafter Pet.) at 4. Second, Northwest also employs a higher rated class of in-flight employees known as "purser's"; the "job" of purser is distinguished from the "job" of stewardess or FSA because the former entails "cargo handling" responsibility

<sup>1</sup> Counsel on the petition were not involved in this case below. There, Northwest was represented by Henry Halladay, David Ranheim, and William Martin of the Minneapolis firm of Dorsey, Marquart, Windhorst, West & Halladay. App. 2a. Although that firm continues to represent Northwest in ancillary proceedings in this case which are ongoing in the district court, it does not appear on the petition.

and "formal, inherent supervisory authority." Pet. 4, 5, 7, 9. Third, the cabin attendants' union had, together with the Company, addressed the issue whether the purser "job" was sufficiently different from that of the FSA or stewardess "job" to justify a substantial pay differential, and found that it was. Pet. 6, 7. Fourth, the Company had, for reasons "understandable from an historical perspective," restricted purser positions to men prior to 1967, and thus fell innocently into the trap of having jobs segregated by sex. *Id.* at 9. Fifth, the courts below, particularly the court of appeals, had it in for Northwest, "adopt[ing] standards and tests that would have the effect of inflating backpay awards and imposing the highest conceivable liability." *Id.* at 10. Sixth, due apparently to this zeal of the lower courts, but not to anything Northwest has been found to have done, Northwest is faced with "one of the largest judgments—and perhaps *the* largest—ever rendered under the Equal Pay Act or Title VII of the Civil Rights Act." *Id.* at 4. Seventh, the calamity which now confronts Northwest is one which Congress intended to avoid by its enactment, in 1947, of 29 U.S.C. § 251. *Id.* at 12-13.

Each of these propositions, however, is demonstrably false.

First, it is not true that the Company has regularly employed male cabin attendants at the same pay as stewardesses. The Company hired its last FSA in 1957; as of 1965 there were only three left; and as of 1970 there were no FSAs employed by Northwest. App. 8a-9a, ¶¶ 17-19.<sup>2</sup> Thus, at all points pertinent to this litigation, all or virtually all of the male cabin attendants were called "pursers"; and all female cabin attendants were called

<sup>2</sup> When the Company had employed FSAs, FSAs had a contractual right to fill purser vacancies in seniority order. App. 7a, ¶ 14.

“stewardesses.”<sup>3</sup>

Second, the district court found as fact that pursers and stewardesses did not occupy separate “jobs,” but rather both occupied a single job—cabin attendant—whose function was to serve and protect customers. App. 36a-37a, ¶¶ 51-53; *id.* 51a, ¶ 69. Northwest did not argue in the courts below that “cargo handling” was a duty distinguishing the purser’s work, perhaps because pursers stopped doing it in 1948 when the Company hired ground personnel for that purpose.<sup>4</sup> Although Northwest *contended* in the district court that pursers had supervisory authority and stewardesses did not, the district court found as fact that pursers were not supervisors and had no “supervisory” responsibilities that stewardesses did not also have. See Part II, *infra*.

Third, there is no evidence in this record that the union, either separately or together with the Company, ever addressed the issue whether a pay differential between pursers and stewardesses was justified by any difference in duties, and Northwest so admitted in its reply brief to the Court of Appeals. See part I, A, *infra*.

Fourth, the Company did not, in 1967, realizing the error of its prior ways, open the higher paid, although otherwise equal, purser classification to women. In fact, the district court found—and Northwest did not appeal the finding—a consistent and intentional pattern of discrimination subsequent to that date denying all women access to the higher

<sup>3</sup> As of 1970, one female had, after the Company had placed every conceivable obstacle in her path, been “promoted” to a purser position. See p. 12, *infra*. At the time this suit was filed, Northwest employed 137 male cabin attendants, all as pursers, and 1,747 female cabin attendants, all but one classified as stewardesses. App. 8a, ¶ 19.

<sup>4</sup> Trial Tr. 2808-10 (Testimony of Northwest’s Manager of Cabin Service).

pay scale enjoyed by the men. App. 11a-22a, ¶¶ 24-38. At the time of the district court’s decision, in 1973, there was not a single woman purser. App. 15a, 16a-17a, ¶¶ 31, 35. Further, despite Northwest’s protestations of innocence and “good faith,” the courts below found that Northwest had engaged in a pervasive pattern of discrimination against female cabin attendants affecting virtually every aspect of the employment relationship. App. 22a-27a, ¶ 39.

Fifth, the opinions of the courts below stand as conclusive contradiction of petitioner’s suggestion that those courts were somehow biased. Moreover, far from taking “each opportunity” to “inflat[e] backpay awards and impos[e] the highest conceivable liability,” Pet. 10, the court of appeals ruled against the plaintiffs’ position on a number of monetary issues, including one which the court conceded had not properly been preserved by Northwest.<sup>5</sup>

Sixth, the size of the judgment is simply a reflection of the extent to which the members of the plaintiff class have been harmed by Northwest’s unlawful conduct. After all, this is a Company that, *inter alia*, paid men 20 to 55 percent more than women<sup>6</sup> for performing work which has been determined by two federal courts to be “equal”. This suit was filed in 1970, but Northwest did not equalize the men’s and women’s salaries until 1976, more than two years after the district court declared the work of pursers and stewardesses “equal”; indeed, some of the adjudicated statutory violations, for which the Company has a monetary liability, are still continuing; thus, the monetary remedy here covers violations spanning more than a decade. Furthermore, the award includes remedies for the numerous

<sup>5</sup> The court of appeals stated, with respect to that issue, “the remedial order in this case is to make employees whole, but not more than whole.” App. 91c. For other, similar rulings, see App. 72c-73c, 77c-78c, 81c-84c.

<sup>6</sup> App. 55a, ¶ 80.

other violations found below which Northwest does not seek to have reviewed by this Court.

Seventh, 29 U.S.C. § 251 has nothing to do with this case. That is the section in which Congress explained why it was overturning retroactively the Supreme Court's "portal-to-portal" decisions; it has no application to any of the issues presented herein. See part IV, *infra*. To date, Congress has evinced no intention retroactively to overturn either Title VII or the Equal Pay Act, nor to deprive victimized employees of the statutory remedies prescribed for violations of those statutes.

# I

Northwest's first question presented is "whether the existence of a *bona fide* collective bargaining agreement treating two jobs as different and establishing wage differentials between them precludes a finding that the jobs are equal and that the employer has 'discriminate[d] . . . on the basis of sex' within the meaning of the Equal Pay Act" (Pet. 2). Under this banner, Northwest in fact advances (as it recognizes, Pet. 19-20) two distinct legal propositions:

- (A) collectively bargained wage rates are "tantamount to a *bona fide* job evaluation plan," (Pet. 14), and (Northwest says) this Court has held that wage differentials resulting from *bona fide* job evaluation cannot be invalidated under the Equal Pay Act; and
- (B) if differentials are established in a good faith albeit mistaken belief that women's and men's jobs are not equal (a mistake which may result from collective bargaining as from any other source) there can be no violation of the Equal Pay Act, for such differentials are based not on sex, but on a good faith mistake.

Neither proposition was timely raised in the lower courts (indeed, the second was *never* raised), there is no evidence furnishing a factual predicate for these arguments, and in any event the arguments are, as legal propositions, frivolous.

## A. Collective Bargaining

Northwest did not argue in the district court that the wage differential between pursers and stewardesses was outside the reach of the Equal Pay Act because collectively bargained. When it first thought of the argument, in the Court of Appeals, it was embarrassed by a threshold difficulty: it had introduced no evidence which suggested in any manner that the collectively bargained wage rates had resulted from a process "tantamount to a *bona fide* job evaluation plan." The record showed only that when Northwest first hired men as cabin attendants, and created the purser classification to receive them, it unilaterally established a higher wage scale for pursers than its stewardesses enjoyed; and that from that point on the union continually sought and obtained "across-the-board" wage increases for all employees. Northwest asked the Court of Appeals to infer, from the single fact that "collective bargaining produced unequal rates," that the company and union negotiators "must have" evaluated the jobs and decided they were different.<sup>6a</sup> The court quite properly concluded that the

<sup>6a</sup> In its openings brief to the Court of Appeals, pp. 27, 37, where the legal argument made its first appearance in this case, Northwest asserted that the company and the union had "evaluated" the jobs and, having "freely agreed that the positions of purser and those of cabin attendants were not substantially identical or equal," established a "bona fide, collectively bargained job evaluation system" paying pursers more than stewardesses. We responded that "there is not one word of record evidence indicating that NWA and the union ever compared the duties of the jobs and/or their relative worth, let alone established a job evaluation system"; that "this record does not show any union 'evaluation' of the comparative duties of the job, nor any 'agreement' that their duties warrant different pay." Brief for Plaintiffs, pp. 5, 45. In its reply brief, Northwest conceded this, but argued that the Court could infer these facts from the single fact that "collective bargaining produced unequal rates." Appellant's Combined Reply Brief and Brief on Cross-Appeal, p. 5. The union "must have evaluated the jobs

inference was impermissible from a barren record (24c-25c).

Thus, even if there were room under the scheme of the Act for a legal argument that wage differentials are outside the Act's reach if they reflect a good faith agreement in collective bargaining that jobs are different, Northwest is precluded from advancing that argument by its failure to prove the factual predicate for the argument.<sup>6b</sup> But the court below was also correct, and indisputably so, in its additional holding that the argument is without merit as a legal proposition (25c-26c).

When Congress was considering adoption of the Equal Pay Act, representatives of American industry sought an exemption for wage differentials resulting from good faith collective bargaining, arguing that bargaining partners are in the best position to evaluate the relative worth of jobs and their judgments should not be subjected to second-guessing by the courts.<sup>7</sup> The effort failed; Congress did not

... [T]he parties necessarily engaged in a comparison of job values. No evidence suggests the contrary ... The only possible conclusion is that the parties were engaged in bona fide job evaluation." *Id.*, pp. 5-6.

<sup>6b</sup> It is of no legal significance that women constituted a majority of the bargaining unit, but it is worth noting anyway that this fact does not mean (as Northwest implies) that women "called the shots" in negotiations. The bargaining unit was at all times affiliated with predominantly male national unions; collective bargaining was always managed by national union representatives who were male; and the union's positions in negotiations often did not reflect the women's interests. Northwest's own brief to the Court of Appeals recited two dramatic examples of this: the union's unwillingness, in the face of pursers' objections, to press for equal treatment for stewardesses who became pursers, Appellant's Brief pp. 7-8; and the union's failure to seek equal pay in the 1972 and 1974 negotiations, despite the pendency of this lawsuit and (by 1974) the district court's decision directing equalization, *id.* at 38. See also App. 7a, ¶¶ 13-14; App. 9a, ¶ 22.

<sup>7</sup> See, e.g., Hearings on Equal Pay Act before the Special Subcommittee on Labor of the House Committee on Education and

exempt wage differentials resulting from good faith collective bargaining.<sup>8</sup> Instead, Congress adopted the "minimum alternative" sought by industry representatives:<sup>9</sup> it deferred the Act's effective date an additional year in the case of collectively bargained wage rates<sup>10</sup> to afford negotiators a "grace period" in which to "become acquainted with [the Act's] demands and to make any necessary adjustments."<sup>11</sup> Congress also added 29 U.S.C. § 206(d)(2) to the bill, prohibiting unions from causing wage discrimination, to assure that unions would not stand in the way of employers' eliminating wage differentials in collective bargaining agreements which violated the Act.<sup>12</sup>

Northwest's legal argument thus is an effort to secure by judicial fiat what industry sought and did not get from Congress. It is hardly surprising that all of the federal courts—from this Court on down<sup>13</sup>—have applied the Act to invalidate wage differentials between jobs which in fact

Labor, 88th Cong., 1st Sess., 99, 101-102, 241-242, 250-251, 186 (1963) (hereinafter House Hearings). See generally BNA Operations Manual, *Equal Pay for Equal Work*, pp. 63-67 (1963) (hereinafter BNA Manual).

<sup>8</sup> BNA Manual 67.

<sup>9</sup> House Hearings 251, 148.

<sup>10</sup> Section 4 of the Equal Pay Act, not codified, Public Law 88-38, 77 Stat. 57 (1963).

<sup>11</sup> 109 Cong. Rec. 9203 (1963) (Rep. Roosevelt). See also *id.* at 7682 (Rep. Goodell); *id.* at 9193 (Rep. Bolton); *id.* at 9196 (Rep. Frelinghuysen); *id.* at 9199 (Rep. Griffin).

<sup>12</sup> BNA Manual 67. See 109 Cong. Rec. 9209 (colloquy between Reps. Goodell and O'Hara).

<sup>13</sup> See, e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188, 192 & n. 4, 194, 208-209 (1974); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970); *Shultz v. American Can Co.*, 424 F.2d 356 (8th Cir. 1970); *Hodgson v. Sagner, Inc.*, 326 F.Supp. 371 (D. Md. 1971), affirmed *sub nom. Hodgson v. Baltimore Regional Joint Board, Amalgamated Clothing Workers*, 462 F.2d 180 (4th Cir. 1972); *Glus v. G. C. Murphy Co.*, 562 F.2d 880 (3rd Cir. 1977); *Denicola v. G. C. Murphy Co.*, 562 F.2d 889 (3rd Cir. 1977).

constitute "equal work" notwithstanding collective bargaining histories treating them as different.<sup>14</sup>

### B. Good Faith

The argument that if a wage differential is adopted in the good faith but mistaken belief that jobs are different then that differential is not "based on sex" and thus does not violate the Equal Pay Act, is made for the first time in this Court. As we explain *infra*, pp. 15-16, this argument, even if it had merit, would be an affirmative defense, which Northwest waived by not pleading. Because Northwest never made the claim below, plaintiffs were not on notice of any need to introduce evidence rebutting the contention, and the lower courts had no occasion to address the contention either factually or legally. It is apparent, however, from what the lower courts *did* say, that if the argument had been made to them they would have found it factually

<sup>14</sup> It bears noting that Northwest's legal argument is defective for yet another reason: it misreads this Court's opinion in *Corning*. Northwest thinks that this Court held in *Corning* that wage differentials resulting from job evaluation are *per se* exempt from invalidation under the Equal Pay Act; it is that "holding" to which it seeks to analogize collective bargaining. But this Court did not hold the results of job evaluation exempt. It merely recognized that Congress had incorporated the same standards into the Act as are customarily employed in job evaluation programs, and that it can thus be "anticipated" that differentials resulting from a bona fide job classification program would not violate the Act. *Corning*, 417 U.S. at 201, quoting the House Report. As Congressman Frelinghuysen, who had spearheaded the incorporation of job evaluation standards into the Act, explained:

"A bona fide job classification system will normally furnish the answer to a claim of discrimination. But in any event the Labor Department or the employee, where an employee brings suit, will have the burden of proving to the court's satisfaction that a violation has occurred." (109 Cong. Rec. 9196 (1963), emphasis added).

deficient even on the existing record.<sup>16</sup> For those courts made findings which are consistent only with a conclusion that Northwest's dual wage scale was motivated by a discriminatory purpose.

The findings below establish that Northwest engaged in a pattern of intentional sex discrimination which pervaded virtually every aspect of the cabin attendant's employment relationship—a pattern which Northwest no longer disputes in this litigation.<sup>16a</sup> One element of that pattern was North-

<sup>16</sup> Northwest's entire argument to the contrary is predicated upon a single statement made by the district court in a different context for a different purpose—a statement which will not bear the weight which Northwest tries to pile on it. Five months after issuance of its findings of fact and conclusions of law, the district court issued its remedial order, which was accompanied by an explanatory memorandum. In that memorandum, the court explained that it was denying liquidated damages because, *inter alia*, Northwest had established the "good faith" required by 29 U.S.C. § 260. In the court's view, Northwest had met this standard by demonstrating that it believed in "good faith" that the purser and stewardess jobs would be found not to constitute "equal work" within the meaning of the Equal Pay Act (App. 1b-2b). That finding is a far cry, however, from a finding that the Company was not motivated by sex in deciding to pay the jobs differently. A company may be motivated by sex in deciding to pay women less than men, and yet believe in good faith that that decision will not contravene an Act which is operative only if the jobs meet a statutory definition of "equal work." That the court found only the latter is evident from its express findings of discriminatory motivation described in the text.

<sup>16a</sup> In addition to the discriminatory refusal to allow women to attain the higher pay scale enjoyed by men, and the discriminatory pay scales themselves, both described in the text *infra*, the district court found that Northwest discriminated against female cabin attendants on the basis of sex in each of the following respects: imposing weight limits upon women, but not men, and suspending and firing women for being five pounds overweight while allowing "very substantially overweight" men to remain at work (App. 22a-

west's refusal to permit women to be classified as pursers and thus attain the higher wage scale.<sup>16a</sup> Northwest went to extraordinary lengths to block women's access to the purser classification, which are described in graphic detail in the district court's findings.<sup>16c</sup> The one woman who survived this gauntlet and became classified as a purser was paid less than her male purser contemporaries, and was "demoted" back to stewardess shortly after this suit was filed.<sup>16d</sup> Northwest did not appeal any of these findings of discrimination.<sup>16e</sup>

24a, ¶ 39(1)-(4); App. 58a); awarding men single rooms on layovers, while requiring women to share double rooms (App. 24a, ¶ 39(5)-(6); App. 58a); allowing men to wear eyeglasses but forbidding women from wearing eyeglasses (App. 24a-25a, ¶ 39(7)-(9); App. 58a); allowing men an unrestricted choice of carry-on luggage, while requiring women to purchase luggage strictly prescribed as to brand, size, and color (App. 25a, ¶ 39(10)-(11); App. 58a); paying men, but not women, a uniform cleaning allowance (App. 25a, ¶ 39(12); App. 58a); prescribing a "chain of command" which precluded men from ever being subordinate to women, even when they admittedly held the same job and the women were senior (App. 25a, ¶ 39(13); App. 58a); and imposing different maximum height requirements for men and women (App. 25a, ¶ 39(14); App. 58a). Northwest appealed only some of these findings to the court of appeals (App. 17c, and n. 81), and that court found all the challenged findings amply supported by the record (App. 40c-49c). Northwest does not seek review in this Court of the holding that it discriminated in these respects.

<sup>16b</sup> In 1970, when this suit was filed, Northwest employed 137 male cabin attendants, all classified as pursers, and 1,747 female cabin attendants, all but one classified as stewardesses. (App. 8a, ¶ 19). Between the effective date of Title VII and the filing of this suit, Northwest had hired 118 new male cabin attendants, all as pursers, and 2,224 female cabin attendants, all as stewardesses (App. 9a, ¶ 20).

<sup>16c</sup> App. 9a-22a; ¶¶ 22-38; App. 33a-34a, ¶ 45.

<sup>16d</sup> App. 15a-17a, ¶¶ 32-35; App. 57a, ¶¶ 3; App. 58a, ¶¶ 5(d), 5(f).

<sup>16e</sup> A number of courts have held, in rejecting employer defenses

Of greatest importance, the district court found a total inconsistency between reality and Northwest's professed reasons for paying pursers more than stewardesses. The court found with respect to each of these proffered reasons that Northwest's behavior belied its claim. Thus, in each case where a duty or responsibility was asserted to justify a distinction between pursers and stewardesses, the court found (1) that the duty or responsibility was performed by stewardesses as well as pursers, and (2) that Northwest did not pay either pursers or stewardesses any different amount according to whether they were assigned such duties or responsibilities. On appeal, the court below indicated its firm conclusion that these inconsistencies reflect a discriminatory purpose. In its discussion of "the guiding principles," the court stated:

"The conclusion to be drawn, when any of these inconsistent patterns exist, is that

"[d]espite claims to the contrary, the extra tasks were found to be makeweights. This left sex—which in this context refers to the availability of women at lower wages than men—as the one discernible reason for the wage differential. That,

based on the "factor other than sex" exemption, discussed *infra*, that discrimination in filling jobs which are in fact "equal work" is itself probative evidence that the employer was motivated by discriminatory purpose in paying them differently. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970), cert. denied, 398 U.S. 905 (1970); *Shultz v. First Victoria National Bank*, 420 F.2d 648, 654-655 (5th Cir. 1969); *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 498 (4th Cir. 1972); *Hodgson v. Security National Bank of Sioux City*, 460 F.2d 57, 61-63 (8th Cir. 1972); *Hodgson v. Behren Drug Co.*, 475 F.2d 1041, 1044-48 (5th Cir. 1973), cert. denied, 414 U.S. 822 (1973); *Brennan v. Owensboro-Daviess Co. Hospital*, 523 F.2d 1013 (6th Cir. 1975), cert. denied, 425 U.S. 973 (1976). In this case, as we next recount in text, the findings provide much more direct evidence of discriminatory purpose in paying pursers more than stewardesses.

however, is precisely the criterion for setting wages that the Act prohibits.' " 16f

Turning to "the case at bar," the court below recounted at length inconsistencies in Northwest's pay practices,<sup>16e</sup> and concluded:

"This evidence leads convincingly to the conclusion that the contrast in pay is a consequence of the historical willingness of women to accept inferior financial rewards for equivalent work—precisely the outmoded practice which the Equal Pay Act sought to eradicate." 16b

In sum, if Northwest had argued below that discriminatory purpose was required for an Equal Pay Act violation; it is virtually certain that the courts below would have found such a purpose.

But even if Northwest had raised the issue in the lower courts, and even if it were indisputable that Northwest was not actuated by a discriminatory purpose, the legal proposition it asserts—that there can be no Equal Pay Act violation if the employer established the wage differential in good faith—is demonstrably frivolous, has been uniformly rejected, and does not merit consideration by this Court.

The most obvious demonstration of the fallacy of Northwest's contention is furnished by 29 U.S.C. §260, which defines the conditions under which an employer may escape double damages for an Equal Pay Act violation. To invoke the protection of §260, an employer must prove, *inter alia*, that he acted in "good faith" in compensating the jobs differently. But if such "good faith" were intended by Congress to exculpate the employer entirely, Congress would not have made it a condition to escaping double damages.

<sup>16f</sup> App. 33c, quoting, *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 286 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

<sup>16e</sup> App. 33c-35c; see also App. 36c-38c, n. 153.

<sup>16b</sup> App. 35c.

Northwest is in the incongruous position of arguing in Part I of its petition that employment decisions made in "good faith" do not violate the Act at all (Pet. 13-20), while ultimately having to confess in Part IV that the *true* import of "good faith" is as a defense to double damages (Pet. 29-32).

That a good faith belief that jobs are different is irrelevant in determining whether the Equal Pay Act has been violated is confirmed by the structure of the statute, its legislative history and purpose, and its uniform construction by this Court and the lower courts.

To begin with, it is clear that a plaintiff meets her burden under the Equal Pay Act by proving that she is being paid lower wages than men for equal work; her burden does not include proving that the employer was discriminatorily motivated in establishing the wage differential. This Court so held in *Corning*, noting the unanimity in the lower courts on the point, 407 U.S. at 195-197:

The Act's basic structure and operation are . . . straightforward. In order to make out a case under the Act, the Secretary<sup>17</sup> must show that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Although the Act is silent on this point, its legislative history makes plain that the Secretary has the burden of proof on this issue, as both of the courts below recognized.

The Act also establishes four exceptions—three specific and one a general catchall provision—where different payment to employees of opposite sexes "is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential

<sup>17</sup> The Act is enforceable both by the Secretary (as in *Corning*) and by affected employees (as here). 29 U.S.C. §§ 216(b), (c).

based on any other factor other than sex." Again, while the Act is silent on this question, its structure and history also suggest that once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions. All of the many lower courts that have considered this question have so held, and this view is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof. [Footnotes omitted]<sup>18</sup>

Thus, if "good faith mistaken belief" were at all relevant to the question whether a violation had occurred, it would have to be as an affirmative defense under the "factor other than sex" exemption. Northwest never pleaded such a defense, indeed did not raise it in any fashion until this Court, and thus has waived it.<sup>19</sup> But even if such a defense had been pleaded, Northwest would not have been helped.

<sup>18</sup> Three members of this Court dissented from the ultimate holding in *Corning* "for the reasons stated by Judge Adams in his opinion for the Court of Appeals in *Brennan v. Corning Glass Works*, 480 F.2d 1254 (CA 3 1973)," 417 U.S. at 210. On the point quoted here, Judge Adams' opinion was in complete accord, 480 F.2d at 1258:

"Once the Secretary has met his burden of showing equal skill, effort, responsibility, and similar working conditions, the employer, in order to prevail on the merits, must demonstrate that the wage differential is made 'pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .'" (Footnote omitted)

<sup>19</sup> Rules 8(c), 12(h), F.R.Civ.P. For FLSA cases see, e.g., *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 104 (9th Cir. 1975); *Brennan v. Mazey's Yamaha, Inc.*, 513 F.2d 179, 184 (8th Cir. 1975); *Mitchell v. Williams*, 420 F.2d 67, 68 n. 2 (8th Cir. 1969), and cases cited therein; *Wirtz v. F. M. Sloan, Inc.*, 411 F.2d 56, 60 (3rd Cir. 1969), affirming 285 F. Supp. 669, 675 (W.D. Pa. 1968).

The language of the exemption, in relevant part, is:

"except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex" (emphasis added).

A mistaken belief is not "a differential," and a payment made pursuant to such a belief is not a "payment . . . made pursuant to . . . a differential based on any other factor other than sex." As the language clearly contemplates, an exception depends upon the existence of an objective difference justifying the payment of higher wages to some employees than to others. And that is what Congress intended. It placed the burden on plaintiffs to show job equality in the four respects universally recognized as relevant in job classification programs: skill, effort, responsibility, and working conditions. *Corning, supra*, 417 U.S. at 198-201. But Congress recognized that there might yet be other objective considerations, apart from sex, which would justify paying some employees more than others, and the exceptions were designed to enable employers to avoid liability by proving that their wage differentials were based upon such considerations. *Id.* at 204. That there must be objective factors justifying wage differentials is apparent from each of the definitive congressional statements of the sweep of the exceptions clause.<sup>20</sup> Nowhere in the legislative history is there a suggestion that an erroneous belief that job duties are different would exonerate an employer from liability.

<sup>20</sup> H. R. Rep. No. 309, 88th Cong. 1st Sess. 3, (1963) (hereinafter "House Report"):

"As it is impossible to list each and every exception, the broad general exclusion has . . . been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded . . ."

Accord. 109 Cong. Rec. 9206, 9208 (Rep. Goodell); *Id.* at 9196 (Rep. Thompson).

Indeed, to so construe the Act would undermine the very purpose for its adoption. The Equal Pay Act was economic legislation. Its central purpose, recognized in *Corning*, and confirmed by the declaration of policy in the statute<sup>21</sup> and by its legislative history,<sup>22</sup> was "to require that 'equal work will be rewarded by equal wages'," 417 U.S. at 195. "The whole purpose of the Act was to require that these depressed wages be raised," *id.* at 207. But that central purpose would be undermined if the Act were inapplicable

<sup>21</sup> Section 2 of the Equal Pay Act, which is not codified, provides:

"Sec. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several states and with foreign nations, to correct the conditions above referred to in such industries."

Public Law 88-38 (1963), 77 Stat. 56.

<sup>22</sup> "The bill . . . would add one additional fair labor standard to the [FLSA]; namely that employees doing equal work should be paid equal wages, regardless of sex." H. Rep. No. 309, 88th Cong. 1st Sess. (1963), reprinted at 109 Cong. Rec. 9210 (1963). "The objective of this legislation is to insure that those who perform tasks which are determined to be equal shall be paid equal wages . . . This bill would provide, in effect . . . that equal work will be rewarded by equal wages." S. Rep. No. 176, 88th Cong. 1st Sess. (1963), reprinted at 109 Cong. Rec. 8914 (1963). See also 109 Cong. Rec. 8914 (Sen. Mansfield); *id.* at 9193 (Rep. St. George); *id.* at 9196 (Rep. Frelinghuysen); *id.* at 9197 (Rep. Griffin); *id.* at 9212 (Rep. Ryan).

whenever an employer believed *mistakenly* that jobs were different.

In sum, even if there were evidence in the record supporting the belated claim of mistaken good faith, and even if the claim were not foreclosed, there would still be no reason for this Court to review the consistent rulings of the lower courts that good faith does not defeat an Equal Pay Act claim.<sup>23</sup>

## II

The second question Northwest seeks to present here could be reached only if this Court were willing to reverse numerous findings of fact entered by the district court and affirmed by the court of appeals. Northwest wants this Court to decide whether two jobs can be found to require "equal skill, effort, and responsibility" within the meaning of the Equal Pay Act when one job is that of a supervisor and the other is that of a supervisee. But that is not what the lower courts found to be the case here. In the district court, Northwest *contended* that the purser was a supervisor and the stewardess was not. But the district court rejected that contention as a matter of fact, finding as fact that: (1) the so-called "supervisory" duties asserted by Northwest were assigned to and performed by both pursers and stewardesses; (2) the "supervisory" duties of stewardesses were the same as those of pursers; and (3) the "supervisory" duties, no matter by whom performed, were not in truth supervisory—the district court invariably put quotation marks around the word—but trivial and incidental to the main functions of the cabin attendant job—func-

<sup>23</sup> See, e.g., *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 422-423 (5th Cir. 1971); *Hodgson v. Daisy Manufacturing Co.*, 445 F.2d 823, 825 (8th Cir. 1971); *Hodgson v. Behren Drug Co.*, 475 F.2d 1041, 1047 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241-242 (5th Cir. 1973).

tions which the court found to be virtually identical whether performed by a purser or a stewardess.<sup>24</sup> The court of appeals reviewed these findings and found them supported by substantial evidence. Northwest wants this Court to reverse these fact findings.

Throughout the trial, Northwest attempted to depict "purser" and "stewardess" as two separate jobs. But the trial court found that there was a single job—cabin attendant—to which the company assigned employees denominated purser and stewardess (App. 36a, ¶ 51):

"Virtually all duties assigned to cabin attendants are performed by all cabin attendants, regardless of classification. In general, cabin attendants are responsible for making pre-departure checks of the cabin; greeting and seating passengers; securing the cabin for take-off; providing food and beverage service; tending to passenger needs; briefing passengers on emergency procedures; guiding and assisting passengers in the event of emergencies; completing required documentation; answering passenger questions; keeping the cabin in a neat and orderly condition, before, during, and after the flight; insuring that passengers conform to required regulations; and deplaning passengers."

Neither pursers nor stewardesses, who are in a single bargaining unit, have any of the duties associated with supervision. They have no authority to suspend, discipline, or even warn other cabin attendants. They have no responsibility to recommend such action to their superiors. They are not responsible for evaluating the performance of other cabin attendants on their flights, unless specifically requested to do so by their superiors. They do not have authority to give other cabin attendants time off. All cabin attendants are equally responsible for reporting acts of misconduct by other cabin attendants to their superiors.

Not once does Northwest's 550-page Cabin Service Manual, which describes the purser and stewardess duties in

<sup>24</sup> App. 49a-51a, ¶ 67-69.

meticulous detail, refer to the purser or stewardess as "supervisor," and not once does it describe any of their duties as "supervisory."<sup>25</sup> Northwest has another category of employees, called "inflight supervisors," who do perform supervisory duties: they evaluate and discipline pursers and stewardesses, and conduct periodic "check rides" to monitor their performance. In-flight supervisors, unlike pursers and stewardesses, are not in the bargaining unit. There was, of course, no claim in this case that the duties of in-flight supervisors constitute "equal work" with stewardesses.

While the assigned duties of all cabin attendants are the same, the district court recognized that because relatively new cabin attendants may be uncertain of their duties and how to perform them the Company has an interest in assuring that more experienced cabin attendants on the flight help them out if they encounter any difficulties. Two cabin attendants on each flight—one in the first class section (the "senior cabin attendant") and one in the tourist section

<sup>25</sup> There are minor differences of wording in the Cabin Service Manual and collective bargaining agreement in describing the functions of pursers and stewardesses, but the district court found that in practice the functions assigned to and performed by pursers and stewardesses were the same. It is an obvious truism—confirmed uniformly by the court decisions—that the reality, and not inaccurate job descriptions, controls the question whether men and women are performing "equal work." 29 C.F.R. § 800.121; *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 724 (5th Cir. 1970); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 227 (7th Cir. 1972); *Hodgson v. Behren Drug Co.*, 475 F.2d 1041, 1049-50, n. 12 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973); *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 288-289 (4th Cir. 1974), cert. denied 420 U.S. 972 (1975); *Brennan v. Owensboro-Daviess Co. Hosp.*, 523 F.2d 1013, 1017 n. 7 (6th Cir. 1975); *Peltier v. City of Fargo*, 533 F.2d 374, 377 (8th Cir. 1976); *Usery v. Allegheny County Institution Dist.*, 544 F.2d 148, 154 (3rd Cir. 1976), cert. denied 430 U.S. 946 (1977); *Katz v. School District of Clayton, Mo.*, 557 F.2d 153, 156 (8th Cir. 1977).

(the "senior in tourist")—are assigned this function, which the district court characterized as "monitoring and where necessary correcting the work of other cabin attendants." App. 49a-50a, ¶¶ 67-68. The senior cabin attendant and senior in tourist positions are occupied by both pursers and stewardesses; and on most flights both positions are occupied by stewardesses. Thus the "monitoring" function is a characteristic not of the purser or stewardess classification, but of the positions of senior cabin attendant and senior in tourist which both stewardesses and pursers occupy. *Id.*<sup>26</sup>

All the pursers and stewardesses who testified at trial stated that the "monitoring" function of the senior cabin attendant position was exactly the same whether the position was occupied by a purser or a stewardess. And the district court so found. App. 49a-51a, ¶¶ 67-69.

Further, there was considerable evidence that the function was a trivial one no matter by whom performed. One witness with 24½ years experience as a purser with Northwest testified:

"Q. How often has something happened where you have had to step into a situation to correct the improper performance of duties by other cabin attendants on your flights?

"A. Only one time since I have been with Northwest Airlines."<sup>27</sup>

Northwest never considered this monitoring responsibility important enough to provide additional compensation to the cabin attendants exercising it. Thus, pursers were all

<sup>26</sup> The cabin attendant filling the senior cabin attendant position on a flight also (1) determines time of meal service and movie showing; (2) moves attendants from section to section to balance workloads; and (3) gives predeparture briefings on emergency equipment and procedures. Each of these duties is performed according to prescribed written directives, and does not involve an exercise of discretion on the part of the cabin attendant.

<sup>27</sup> Appendix in court of appeals at 524.

paid according to the same scale whether or not they served as senior cabin attendant; and stewardesses were all paid according to the same scale, which was considerably lower than the purser scale, whether or not they served as senior cabin attendant.<sup>28</sup> Based on all the evidence, including an exhaustive showing of the nature of all aspects of the cabin attendant's job, the district court found that the monitoring function of senior cabin attendants "*whether purser or stewardess*" is "less important than . . . the other functions assigned to all cabin attendants." App. 51a, ¶ 69 (emphasis added).

Northwest asserts that by quoting this finding of the district court, "the court of appeals disparaged this supervisory responsibility" (Pet. 22). But it was the evidence as found by the district court which disparaged that responsibility.<sup>29</sup> And, in any event, that responsibility was not one that distinguished pursers from stewardesses, for the "supervisory" responsibility assigned to and performed by pursers—be it trivial or significant—was found to be identical to the "supervisory" responsibility assigned to and exercised by stewardesses.<sup>30</sup>

<sup>28</sup> The legal significance of this fact is aptly described by the court of appeals at App. 31c-36c.

<sup>29</sup> See App. 29c-33c, where the court of appeals discusses the authorities and the legal principles applicable to the question whether "insubstantial or minor" additional duties may justify paying men more than women.

<sup>30</sup> At one point in its petition, Northwest cites certain of the findings below relating to *documentary* duties in support of its claim of an "undeniable material difference between the specific functions and responsibilities of pursers and stewardesses" (Pet. 22). The district court made meticulous findings respecting the documentary duties of pursers and stewardesses (App. 39a-47a, ¶¶ 58-63), all of which support its ultimate finding that pursers' documentary duties involve no greater skill, effort or responsibility than stewardesses' documentary duties (App. 47a, ¶ 64). Perhaps the most revealing demonstration of the weakness of Northwest's

In sum, Northwest has attempted to dress up as an issue of law what is in truth nothing more than a complaint about the findings of fact made by a district court and affirmed by a court of appeals. The courts below did not hold—as Northwest suggests, Pet. 24—that a lieutenant and a master sergeant perform “equal work.” Rather, they held that two corporals perform “equal work.” Northwest thinks that the courts below miscounted the employees’ respective stripes, and that one in fact had more than the other. It asks this Court to grant certiorari and conduct a recount.

### III

The district court, finding Northwest’s violations of the Equal Pay Act “willful,” applied the three-year (rather than two-year) statute of limitations prescribed in 29 U.S.C. §255(a). The court below affirmed. Northwest seeks review of this holding, contending that a violation cannot be “willful” unless committed in bad faith. That contention is contrary to the construction normally accorded the term “willful” in civil statutes, has been rejected uniformly by the lower courts, and does not merit this Court’s attention.

“Willful, as we have said, is a word of many meanings, its construction often being influenced by its context.” *Spies v. United States*, 317 U.S. 492, 497 (1943). “The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental.” *United States v. Murdock*, 290 U.S. 390, 394 (1933). Only in certain criminal statutes has the word been construed to mean “an act done with a bad purpose.” *Murdock, supra*, 290 U.S. at 394; *United States v. Illinois Central R. Co.*, 303 U.S. 239, 242-243 (1938).

position is that it cites documentary duty findings in support of a claim relating to “supervision” while never citing the findings in which the district court expressly found the “supervisory” duties to be the same (App. 49a-50a, ¶¶ 67-68).

It is one thing to require a showing of bad purpose before criminal penalties are visited. But the stakes are quite different when, as here, the choice is between employees receiving wages improperly denied them and the employer escaping with a windfall which Congress found to be contrary to public policy (*Corning, supra*, 417 U.S. at 207).<sup>31</sup> Thus it is hardly surprising that the lower courts, in force, have held that bad purpose is not required to activate the three-year statute of limitations contained in 29 U.S.C. §255(a).<sup>32</sup>

While rejecting a requirement of bad purpose, the lower courts have differed somewhat in articulating what is required to make a violation willful. This cannot avail Northwest, however, for the court below made clear that on this

<sup>31</sup> As this Court explained in *Corning*, 417 U.S. at 207:

“The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics since Congress recognized as well that discrimination in wages on the basis of sex ‘constitutes an unfair method of competition.’ ”

<sup>32</sup> *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied 409 U.S. 948 (1972); *Brennan v. General Motors Acceptance Corp.*, 428 F.2d 825, 828 (5th Cir. 1973); *Brennan v. J. M. Fields, Inc.*, 488 F.2d 443, 448 (5th Cir. 1974), cert. denied 419 U.S. 881 (1974); *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974); *Brennan v. Air Terminal Parking, Inc.*, 21 W.H. Cases 475, 482 (D.S.C. 1974), affirmed 498 F.2d 1397 (4th Cir. 1974); *Brennan v. Zager*, 22 W.H. Cases 323, 328 (M.D. Tenn. 1975), affirmed 529 F.2d 524 (6th Cir. 1975), cert. denied 429 U.S. 821 (1976); *Dunlop v. State of Rhode Island*, 398 F. Supp. 1269, 1275 (D.R.I. 1975), reversed on other grounds 22 W.H. Cases 1272 (1st Cir. 1976); *Conklin v. Joseph C. Hofgesang Co.*, 407 F. Supp. 1090, 1094 (W.D.Ky. 1975); *Pezzillo v. Gen. Tel. & Electron. Inform. Sys., Inc.*, 414 F. Supp. 1257, 1269 (M.D. Tenn. 1976); *Dunlop v. New Hampshire Jockey Club, Inc.*, 420 F. Supp. 416, 423-424 (D.N.H. 1976); *Usery v. Goodwin Hardware, Inc.*, 426 F. Supp. 1243, 1267 (W.D. Mich. 1976); *Herman v. Roosevelt Fed. Sav. & L. Ass’n*, 432 F.Supp. 843, 851 (E.D. Mo. 1977).

record Northwest's conduct was "willful" under *any* of the arguable standards; indeed, the Court below proffered a construction of §255(a) *more favorable to defendants* than that applied by most courts (App. 51c-59c).

Northwest argues (Pet. 27) that the definition of "willful" under §255(a) must be the same as that accorded the same term under the FLSA's criminal provision, 29 U.S.C. §216(a). We doubt the merit of that contention.<sup>33</sup> But even if it had merit, it would not matter here, for the court below found that the violation here was "willful" even under the § 216(a) standard. App. 58c, n. 230.<sup>34</sup>

<sup>33</sup> § 216(a) was enacted in 1938, and § 255(a) in 1966, and there is no evidence that in 1966 Congress was aware of, let alone intended to incorporate into § 255, the meaning assigned "willful" under § 216(a). Moreover, as the court below recognized (App. 58c, n. 230), the "purposes of the two sections are entirely different": § 216(a) punishes criminal conduct, whereas § 255(a) implements "a policy to which punishment is entirely foreign" (*id.*). That Congress "used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula," *United States v. Bishop*, 412 U.S. 346, 359-360 (1973) (emphasis added), hardly means, as Northwest suggests (Pet. 27), that Congress so intended in civil and criminal statutes enacted 28 years apart. Thus, while "willful" in the criminal tax fraud statutes requires evil purpose (as *Bishop* held), that same term in the civil tax fraud statutes has been construed to require only "intentional, knowing and voluntary" conduct. *Monday v. United States*, 421 F.2d 1210, 1215-16 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970), and cases cited therein.

<sup>34</sup> The judicial definition of "willful" in § 216(a) has remained constant throughout several decades. *Hertz Driverself v. United States*, 150 F.2d 923, 928-929 (8th Cir. 1945); *Nabob Oil Co. v. United States*, 190 F.2d 478, 480 (10th Cir. 1951), cert. denied, 342 U.S. 876 (1951); *Coleman, supra*, 458 F.2d at 1142; *United States v. Fidanian*, 465 F.2d 755, 760 (5th Cir. 1970). As stated in *Nabob*, 190 F.2d at 480, to be "willful" under § 216(a) "[i]t is sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, acci-

There is, accordingly, no occasion in this case to review the application of §255's three-year statute of limitations.<sup>35</sup>

#### IV

The district court denied plaintiffs liquidated damages for the Equal Pay Act violations, holding that Northwest had met its burden of proving a defense under 29 U.S.C. § 260 (App. 1b-2b).<sup>35a</sup> The court below reversed, and remanded "the matter of liquidated damages in toto for reconsideration by the District Court" (App. 69c). Northwest's argument why this Court should review that ruling rests upon a misunderstanding both of the decision below and of § 260's place in the FLSA legislative scheme.

Section 260 modifies the "automatic" liquidated damages command of § 216(b) by conferring discretion upon the court to reduce or withhold liquidated damages,

"if the employer shows to the satisfaction of the court that the act or omission giving rise to such [FLSA] action was in good faith and that he had reasonable

dentally or by ordinary negligence." This was the existing definition of § 216(a) in 1966, when § 255(a) was enacted. The court below expressly held: "We reach no different conclusion in this case by that definition" (App. 58c, n. 230).

<sup>35</sup> Northwest's implication (Pet. 29, n. 16) that this holding resulted in a 50% inflation of its liability is incorrect. The holding resulted in backpay from 1967 to date rather than 1968 to date.

<sup>35a</sup> The term "double damages" conveys a distorted impression of the potential significance of this issue; even if granted, liquidated damages would have a relatively minor effect upon the total backpay award. Only the stewardesses who affirmatively joined the lawsuit as Equal Pay Act plaintiffs would be eligible for liquidated damages—mere class members would not, 29 U.S.C. § 256—and liquidated damages would be in lieu of interest. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 715 (1954). Thus, the interest awarded by the district court, App. 14b-15b, which has been accruing and compounding for as much as 11 years, must be offset in evaluating the impact of a liquidated damages award.

grounds for believing that his act or omission was not a violation of the [FLSA] . . ."

As the conjunctive "and" in § 260 makes clear, the employer bears the burden of proving both subjective good faith and objective reasonable grounds;<sup>36</sup> and even then the court retains discretion to award liquidated damages in whole or in part.<sup>37</sup>

In the instant case, the district court apparently found that Northwest had met both standards. That court based its conclusion upon the following analysis (App. 1b-2b):

"The Defendant did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardess' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point. The Court finds 'good faith' on the part of the Defendant. . . ."

Northwest asserts (Pet. 30) that the court below, in reversing, "held that four of these five factors were irrelevant to the determination of reasonable, good faith belief." That

<sup>36</sup> *Rothman v. Publicker Industries*, 201 F.2d 618, 620 (3rd Cir. 1953). Accord: *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2nd Cir. 1953), cert. denied 346 U.S. 877 (1953); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 947 (2nd Cir. 1959) (Friendly, J.); *Wright v. Carrigg*, 275 F.2d 448, 449 (4th Cir. 1960); *McClanahan v. Mathews*, 440 F.2d 320, 322-323 (6th Cir. 1971); *Richard v. Marriott Corp.*, 549 F.2d 303, 306 (4th Cir. 1977). See also 29 C.F.R. § 790.22(b).

<sup>37</sup> *McClanahan*, *supra*, 440 F.2d at 322-324; 29 CFR § 790.22(b).

is a misreading of the decision below. The court below recognized that the first four factors enumerated by the district court were relevant to the *subjective* standard (good faith), but held that in the particular circumstances of this case they did not support the district court's holding on the *objective* standard (reasonable grounds). As the court below explained (App. 66c-67c).

"That an employer and others in the industry have broken the law for a long time without complaints from employees is plainly not the reasonable ground to which the statute speaks. Nor is it enough that it appear that the employer probably did not act in bad faith; he must affirmatively establish that he acted both in good faith and on reasonable grounds. That duty is accentuated here, where the prevalence of sex-discrimination litigation against the airline industry naturally prompts the question whether NWA should reasonably have known that neither its own tradition, the industry custom nor the employees' silence was a reliable indicium of the demands of the law" (footnotes omitted).<sup>38</sup>

<sup>38</sup> Northwest's efforts to denigrate the significance of the consideration in the last sentence of this quotation are disingenuous. (Pet. 30-31, note 17). The airline industry, *en masse*, witnessed the demise, as sex-discriminatory, of a number of long-standing industry practices immediately after Title VII was enacted. Northwest's own litigation experiences in 1965-1968 respecting two of these practices—requiring stewardesses to retire at age 32, and earlier upon marriage—are recounted in the district court's findings (App. 25a-27a). The "employment practices at issue in this litigation" (Pet. 31, n. 17) occurred from 1967 through 1977, and all of the lawsuits cited by the court below were commenced prior to, or early in, this period. The court indicated ("e.g.") that the lawsuits cited were merely exemplary. See, in addition, e.g., *Evenson v. Northwest Airlines*, 1 FEP Cases 177 (E.D. Va. 1967); *Air Transport Association v. Hernandez*, 1 FEP Cases 168 (D.D.C. 1967); *Vogel v. Trans World Airlines*, 2 FEP Cases 297 (W.D. Mo. 1969); *Lansdale v. United Airlines*, 437 F.2d 454 (5th Cir. 1971), reversing 2 FEP Cases 462 (S.D. Fla. 1969). Two of the lawsuits cited by the court below involved challenges to pay differentials between pursers and

The court below recognized, of course, that the fifth factor—the absence of any clear legal precedent or guideline precisely in point—is relevant to the objective standard (App. 67c). “Indeed, just that sort of employer-predicament was the concern of Congress when it enacted [§ 260]” (App. 68c). But the court below observed, accurately, that the district court had made no finding that Northwest’s decision to pay stewardesses less than pursers was in any way influenced by uncertainty about the law, and remanded for the district court to address this question of fact (*id.*). This was no mere formality, for as the court below had earlier noted (App. 60c), Northwest’s only witness on the subject did not claim that the Company had been influenced by any uncertainty in the law, but rather that the Company had maintained the dual wage scale because it felt that the jobs were different; indeed, it does not appear that Northwest sought or obtained “any sort of legal advice at all.” (*id.*). The court’s holding that uncertainty in the law is relevant only if it influenced the employer’s decision is in accord with the decisions of all other Circuits which have addressed the question.<sup>39</sup>

stewardesses, as Northwest recognizes (Pet. 13, note 6; but contrast Pet. 31, note 17), and the EEOC found reasonable cause in 1970 to believe such differentials unlawful.

<sup>39</sup> See cases cited *supra*, p. 28, n. 36. See also *Snell v. Quality Mobile Home Brokers, Inc.*, 424 F.2d 233, 236 (4th Cir. 1970). Mere errors of fact—i.e., a mistaken understanding of employees’ duties—does not suffice to establish a § 260 defense. An employer is “responsible for knowing what its employees were doing,” *Day & Zimmerman v. Reid*, 168 F.2d 356, 360 (8th Cir. 1948). The legislative history (described at p. 33, n. 41, *infra*) confirms that § 260 was enacted to assist employers affected by legal uncertainty. For examples of evidentiary showings which met the objective standard of § 260, see *General Electric Co. v. Porter*, 208 F.2d 805, 816 (9th Cir. 1953); *Foremost Dairies v. Ivey*, 204 F.2d 186 (5th Cir. 1953); *Fred Wolferman, Inc. v. Gustafson*, 169 F.2d 759, 765 (8th Cir. 1948).

Finally, the district court’s opinion (App. 1b-2b) had given no indication that it was aware that the employer’s satisfaction of both the subjective and objective standards did not automatically require the denial of liquidated damages, but merely triggered the existence of discretion in the district court to “award no liquidated damages or award any amount thereof not to exceed [double damages]” (§ 260). It is not clear whether the district court recognized that it possessed such discretion, nor, if it did, what factors influenced its exercise thereof. The court below quite properly reminded the district court of this point and directed that it be addressed on remand (App. 68c). Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-417, 422-423 (1975).

Northwest attempts to make this perfectly reasonable disposition appear worthy of this Court’s attention through a misreading of § 260’s place in the legislative scheme. Northwest argues that the court’s rejection of the first four factors is inconsistent with the legislative concerns which prompted adoption of § 260 (Pet. 30):

The four factors that the court below discarded are derived from the statute itself. In 1947 Congress gave statutory relief for “good faith” acts to remove the harshness of a liquidated damages provision that previously had been construed as mandatory. Congress found that without the amendment the Fair Labor Standards Act would result in “wholly unexpected liabilities, immense in amount and retroactive in operation” by unexpectedly overriding “long-established customs, practices, and contracts between employers and employees.” 29 U.S.C. § 251(a). (Congressional findings and declaration of policy). The amendments, including the “good faith” provision of § 260, were intended to avoid this result and to “protect the right of collective bargaining.” 29 U.S.C. § 251(a)(6). Yet the decision below holds that (i) tradition and custom, (ii) industry practice, (iii) the collective bargaining agreement, and (iv) Northwest’s experience under it—the very circumstances that Congress declared give

presumptive legitimacy to employment practices—are irrelevant in applying the “good faith” provision of § 260.

The simple answer is that the decision below *did* consider these circumstances relevant in applying the “good faith” provision of § 260; it held them irrelevant only to the “reasonable grounds” provision.

There is, however, a more fundamental deficiency in Northwest’s argument: it misconceives the significance of the declaration in 29 U.S.C. § 251. That declaration explained *not* the reasons for adopting § 260, but rather the reasons for adopting 29 U.S.C. § 252.<sup>40</sup> The legislative materials make clear that the *sole* reason for adopting § 260 was to provide discretion to district courts to relieve employers

<sup>40</sup> The principal stimulus to enactment of the Portal-to-Portal Act, as its title suggests, was the Supreme Court’s construction of the FLSA, in three decisions, as treating time spent travelling between the employer’s gate and the workplace as time “worked.” In each of these decisions the Court declared it irrelevant that the custom in American industry, confirmed in collective bargaining agreements, was *not* to treat such time as time worked. *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590, 602 (1944); *Jewell Ridge Corp. v. Local*, 325 U.S. 161, 167 (1945); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). Congress responded to these decisions by enacting 29 U.S.C. §§ 252 and 254. § 254 overruled the Supreme Court’s construction of the FLSA in these cases. § 252 retroactively exonerated employers for antecedent violations **except in those instances where custom and/or collective bargaining agreements had treated such time as time worked.** It has been universally recognized that the findings and declaration of policy in 29 U.S.C. § 251 were addressed to these provisions, and particularly to § 252 (which, it could be foreseen, would be challenged as unconstitutional). The “purpose” articulated in § 251 was “fulfilled by the enactment of Section 2 [§ 252].” *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956). See also *Battaglia v. General Motors Corp.*, 169 F.2d 254, 258 (2d Cir. 1948); *Addison, supra*, 204 F.2d at 96 (L. Hand, J., concurring).

of liquidated damages where they have attempted to comply with the law but been disabled by uncertainty as to what the law requires.<sup>41</sup>

## V

The courts below ruled that the 1972 amendment to Title VII restricting backpay awards to two years prior to the filing of the EEOC charge is inapplicable to cases pending in court at the time of its adoption. That ruling is in accord with the decision of every Court of Appeals which has considered the question,<sup>42</sup> and is plainly correct for the reasons

<sup>41</sup> As explained in H. Rep. No. 71, 80th Cong., 1st Sess. 3, 7-8 (1947), and as the court below understood, App. 64c, § 260 was a response to the decisions of the Fourth Circuit and the Supreme Court in *Missel v. Overnight Motor Transportation Co.*, 126 F.2d 98 (4th Cir. 1942), affirmed 316 U.S. 572 (1942). See also 93 Cong. Rec. 2234-35 (1947) (colloquy between Sens. Donnell and Ferguson). In *Missel*, the Fourth Circuit applied the then-mandatory liquidated damages provision of the FLSA with the following “lament,” 126 F.2d at 111:

“It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authority in the courts to be subjected to such a measure. Yet no matter how much we lament its harshness, the Section appears to be mandatory and virtually all the courts have so construed it.”

The Supreme Court, noting that the violation had stemmed from the employer’s “inability to determine whether the employee was covered by the Act, (316 U.S. at 582)—an inability caused by uncertainty as to the proper construction of one of the Act’s exemptions (*id.*)—held that “[p]erplexing as petitioner’s problem may have been” the liquidated damages provision was mandatory (*id.* at 582).

There is not a word in the legislative history suggesting that § 260 was to be available to employers in any circumstances other than good faith reliance, upon reasonable grounds, on a legal construction which ultimately turns out to be wrong.

<sup>42</sup> *Bing v. Roadway Express*, 485 F.2d 441, 453, n. 14 (5th Cir. 1973); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975), vacated and remanded for consideration of other issues, 431

stated in the opinion below (App. 71c-72c).

Even if the question warranted this Court's attention in an appropriate case—a doubtful proposition, for the number of pre-1972 lawsuits still pending surely must be small—this is not such a case, for the decision below may yet produce a two-year limit. The court below ruled that the back-pay limit for cases filed prior to the 1972 amendments is “the period prescribed by the most analogous state statute” (App. 73c). The court remanded to the district court the determination of what state statute is most analogous, noting that “[t]he statutes cited to us by the parties contain two- or three-year limits” (App. 74c, n. 300).

## VI

The final issue which Northwest seeks to have this Court review is one which (1) arises out of a *sui generis* set of facts which render the legal issue of no general importance, (2) arises at an interlocutory stage, and (3) may in fact end up without having any practical effect upon any party's rights or obligations. To understand why this is so, it is necessary to describe the facts and holdings below in more detail than Northwest does in the petition.

The district court had awarded backpay under Title VII to all stewardesses who had flown within two years of the filing of the charge, irrespective of whether and when they had terminated their employment (App. 8b-9b; ¶ 7(a)). Northwest appealed, contending that those who terminated employment more than 90 days prior to the filing of the first EEOC charge no longer had Title VII claims which they could assert on their own behalf, and thus should be excluded from the class recovering backpay. On this issue, Northwest prevailed in the court below. The court concluded that “the District Court on remand must exclude

U.S. 951 (1977); *EEOC v. Steamfitters Local 638*, 542 F.2d 579, 590 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977).

from the Title VII recovery period those employees whose connection with NWA was dissolved more than ninety days before the class filing with the Commission” (App. 90c; see also *id.* at 81c-84c).

The court was concerned, however, that some among those to be excluded might have been misled to their detriment by Northwest's failure to assert a time-limits defense prior to trial.<sup>43</sup> The district court had sent class notices long before trial, at a time when the employees in question could still have timely joined in the *Equal Pay Act* portion of this lawsuit,<sup>44</sup> advising these employees that even if they did not join in the *Equal Pay Act* portion of the lawsuit they “would be entitled to share in any money award which the Court grants under the Civil Rights Act” (App. 85c). Northwest's counsel, who had not asserted any defense based on timeliness, did not challenge this wording when it was proposed.<sup>45</sup> It is thus theoretically possible that some employees who would otherwise have timely joined the *Equal Pay Act* portion of the lawsuit refrained from doing so in reliance upon the notices' assurance that they would

<sup>43</sup> Northwest never pleaded a time-limit defense. At the close of the trial, it requested leave to amend its answer to assert that the action was untimely (App. 90c; Trial Tr. at 3571). Even then, Northwest did not focus a claim upon the status of those who had terminated more than 90 days before the filing of the first EEOC charge (Trial Tr. at 3571). Northwest first attacked the inclusion of these employees in its brief on remedies, following the district court's issuance of its findings of fact and conclusions of law.

<sup>44</sup> The notices were mailed in 1971. Under either a two- or three-year statute of limitations (See III, *supra*), employees who had terminated more than 90 days but less than two years prior to the filing of the first EEOC charge (on March 28, 1970) retained timely *Equal Pay Act* claims.

<sup>45</sup> Plaintiffs' counsel tendered proposed class notices for the Court's consideration. Northwest filed a document commenting in other respects upon the propriety of sending Plaintiffs' proposed notices, but did not challenge the text or ask that it be changed.

recover in any event, should plaintiffs prevail, under Title VII. The court below concluded that Northwest was estopped by its failure to assert a time limits defense before the notices were sent from objecting to recovery by any employees who were "lulled into inaction on their Equal Pay Act rights in the understanding that they would share in any Title VII recovery" (App. 90c).

Accordingly, as an exception to its ruling that those who terminated employment more than 90 days before the filing of the first EEOC charge must be denied recovery, the court below ruled that the district court "must retain in the class for the Title VII recovery those employees who would have brought themselves within the Equal Pay Act class by filing consents" (App. 90c, 2e).<sup>46</sup> The court found that the statute did not deprive it of the traditional equitable power to apply estoppel principles in this manner (*id.* 85c-89c). It is this construction which Northwest claims is worthy of review.

Assuming *arguendo* that the question whether Title VII's time limit is a "jurisdictional prerequisite" such that it is not subject to "equitable modification" were one warranting review in an appropriate case,<sup>47</sup> this is not such a case

<sup>46</sup> The court's original opinion had used the word "could" rather than "would"—a formulation which would have provided recovery to *all* the terminated employees and which thus was inconsistent with the clear intendment of the court's discussion at App. 90c. The court corrected the mistake *sua sponte*, App. 2e.

<sup>47</sup> Northwest's contention (Pet. 38) that this Court has already decided this issue in favor of its position, in *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), is not supported by a reading of the opinion in that case. This Court held in *Electrical Workers* that an employee's pursuit of grievance-arbitration procedures does not toll the time for filing an EEOC charge. But the Court arrived at that result by carefully examining the grounds advanced for tolling in such circumstances, and concluding that they did not meet the requirements for an equitable

for several reasons:

(1) This case arises on a *sui generis* set of facts. Indeed, it is virtually inconceivable that the precise issue presented here would ever recur in another case. And the peculiar facts create substantial doubt that a resolution of this case would have any precedential value for other cases.<sup>48</sup>

(2) It is doubtful whether any employee will in fact recover backpay because of this ruling. The court has merely provided an opportunity for former employees to attempt to prove that they "would have" joined the Equal Pay Act portion of the lawsuit but for the wording of the class notice. We do not know whether there are any persons who claim to have relied in this respect. And even if there are, it is far from certain that they will ever learn of the court's ruling and thus be able to avail themselves of the opportunity it affords. (The affected employees terminated their employment in 1968 and 1969, and neither plaintiffs nor Northwest have addresses post-1969 at which to contact them.) Thus, if this Court were not inclined to grant certiorari on the other issues in this case, it would be a classic instance of the "tail wagging the dog" to delay further the indisputably eligible employees' receipt of the

modification of the time limit. Had the Court's holding been that *all* equitable modifications are precluded, there would have been no occasion to analyze in such detail the alleged justification for the particular modification sought in that case.

<sup>48</sup> The issue here is not whether a court has jurisdiction over an otherwise untimely Title VII action based upon a tolling principle. The issue here, rather, is whether, in a case over which the court indisputably has jurisdiction, it may extend a remedy to particular class members based upon estoppel. This Court has already held that class members who did not themselves file charges may share in Title VII recoveries—the filing of a charge is not "jurisdictional" in that sense—and that the courts have traditional equitable discretion in formulating class remedies for Title VII violations. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414, 416-425 (1975).

remedies due them to litigate this question now. If in fact there prove to be actual claimants who prevail on this issue, Northwest can seek review at that time without delaying the rights of everyone else.

(3) A victory for Northwest on this issue in this Court would be meaningless, even if such employees *do* exist and come forward. For the "estoppel" upon which the court below relied would support tolling of the *Equal Pay Act's* time limit just as the court found it justified equitable consideration under Title VII. And there can be no question but that the Equal Pay Act's time limit is a traditional statute of limitations, and thus subject to equitable tolling principles.<sup>49</sup> Thus a reversal on this issue would result merely in the employees' securing recovery under the Equal Pay Act rather than Title VII.

<sup>49</sup> See e.g., *Hodgson v. Humphries*, 454 F.2d 1279, 1283-84 (10th Cir. 1972); *Ott v. Midland-Ross Corp.* 523 F.2d 1367, 1370 (6th Cir. 1975); *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485, 487 (5th Cir. 1974).

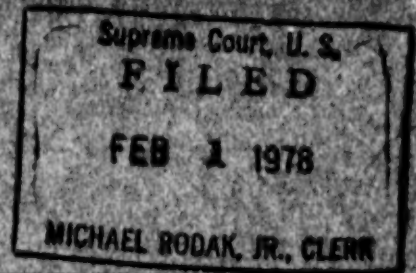
## CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied. Northwest's alternative suggestion—that the Court "vacate the judgment below and remand the case for full reconsideration in light of . . . intervening decisions" (Pet. 30)—is a frivolous stalling tactic. The Court of Appeals held the petition for rehearing for ten months awaiting the issuance of this Court's decisions, and in denying rehearing declared that it had considered the petition "in light of . . . the decisions of the Supreme Court of the United States subsequent to the opinion" (App. 2f). The Court of Appeals was plainly correct in its assessment that none of the intervening decisions warranted alteration of its decision; but correct or not, the Court below has already undertaken the "reconsideration" for which Northwest invites a remand. In a footnote, Northwest notes that there are yet additional Title VII and Age Discrimination cases on the Court's docket *this* term (Pet. 39, n. 28). Each of the cases cited has now been decided, and none bears on the issues presented in the petition.

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No. 77-802



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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**NORTHWEST AIRLINES, INC.,**  
*Petitioner,*

v.

**MARY P. LAFFEY, et al.,**  
*Respondents.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the District of Columbia Circuit

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**REPLY BRIEF IN SUPPORT OF PETITION**

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*Respondents.*

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**On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit**

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**REPLY BRIEF IN SUPPORT OF PETITION**

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**Introduction**

In attempting to discourage the Court from granting certiorari, respondents suggest that this case is a hopeless morass in which the issues tendered by Northwest are new to the case and depend upon a rejection of the findings by the courts below. Neither point is founded.

Northwest does not seek to have a single finding overturned by this Court. The issues in this case turn, not on redetermination of basic facts, but on assessment of their legal significance. The argument that the legal issues were not adequately raised or preserved in the courts below simply flies in the face of the fact that the questions presented are directed solely to issues *actually decided* — erroneously, we contend — by the courts below.

Although respondents seek to paint a picture of Northwest as having been found to have intentionally engaged in a calculated plan to discriminate against women, they ignore the critical factual finding on this central issue. The district court as trier of fact expressly found that Northwest had acted *in good faith* and had not intentionally based the purser/stewardess pay differential on sex:

“The Defendant did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. . . . The Court does not find an intentional, bad faith attempt to evade the law.” (Pet. App. 1b-2b.)

A brief discussion of the seven factual premises that respondents argue are the unsupportable predicates for the petition will show that respondents have either misperceived our points or erred in contending that the pertinent premises are not supported by the record.

First, respondents argue that it is “not true” that Northwest regularly has employed male cabin attendants at the same pay as stewardesses (Br. in Opp. 3). The present employment of male FSA’s, however, is not the relevant consideration. What is critical is that, during the period predating the Equal Pay Act, there was a pay differential between the position of purser, on the one hand, and the positions of female stewardess and male FSA on the other. This established dichotomy, with

men on both sides of the pay differential, continued for many years after passage of the Act and demonstrates that the pay differential was not sex-based. We argue that this history establishes that the differentials between pursers and other cabin attendants were not discriminatory within the meaning of the Act. *Cf. Hazelwood School District v. United States*, 97 S. Ct. 2736, 2443 (1977) (“the employer must be given an opportunity to show ‘that the claimed discriminatory pattern is a product of pre-Act [employment practices] rather than unlawful post-Act discrimination’”). Here, there is no question that the pay differential was legal when adopted, was *not* the product of discriminatory practices, and was not “based” on sex.<sup>1</sup>

Second, respondents argue (Br. in Opp. 4) that the courts below found that pursers did not have distinct “supervisory authority.” That is not correct. The existence of that supervisory authority over stewardesses was expressly found by the courts below (Pet. App. 48a-51a; Pet. App. 15c-16c, 37c-39c), and the issue raised here is purely one of law: whether the courts below applied the correct legal standards in discounting the relative significance of the supervisory relationship between pursers and other cabin attendants, including both stewardesses and FSA’s.

Third, respondents contend (Br. in Opp. 4) that there is no evidence that their union and Northwest ever addressed the issue whether the pay differential between pursers and stewardesses was justified by any differences in duties. The job differences, however, were set forth in the collective bargaining agreement (Pet. App. 6a-7a, ¶¶ 10-11), and, as the district

<sup>1</sup> Respondents’ assertion that there are no longer any male FSA’s is disingenuous at best. They fail to mention the finding of the district court that Northwest recently had hired male cabin attendants as “stewards” to perform “the same duties as stewardesses and FSA’s” and that “[a]t all times from 1949 to the present, FSA’s and stewards have been compensated at the same rate as stewardesses of equal longevity” pursuant to “the same union negotiated and agreed upon rate of pay” (Pet. App. 9a, ¶ 21).

court expressly held (Pet. App. 1b-2b), no one had ever suggested during negotiations that Northwest's belief that the jobs were materially different was erroneous. Instead, all of the efforts by the union were directed toward opening *promotional* opportunities from the stewardess position to the purser position. These facts showing the behavior of interested parties clearly demonstrate that Northwest and the stewardesses' union both shared a common assumption that the jobs were different.<sup>2</sup>

Fourth, respondents allege that "despite Northwest's protestations of innocence and 'good faith,' the courts below found that Northwest had engaged in a pervasive pattern of discrimination . . ." (Br. in Opp. 5). This assertion inexplicably ignores the basic factual finding by the district court (Pet. App. 1b-2b) that Northwest had proven that the pay differential between pursers and stewardesses was actually based on a good faith belief that the two positions were different, rather than on a desire to discriminate against women.

Fifth, raising a straw man, respondents insist that the record does not support an argument that the courts below were "somehow biased" against Northwest (Br. in Opp. 5). Northwest, however, is making no such argument. The point we

<sup>2</sup> Attempting to rebut the inevitable inferences from the district court's finding that the membership of the cabin attendant unions that negotiated these agreements was "predominantly female" (Pet. App. 5a, ¶ 8), respondents assert (p. 8, n.6b) that the bargaining unit was "affiliated" with predominantly male "national unions" and that collective bargaining was "managed" by male representatives of the national union. The first statement is accurate but irrelevant; the second is unsupported by citation and is contradicted by the record.

What is controlling is the express finding that the stewardesses exercised their "numerical superiority over males in the affairs of the class or craft and the union representative" by selecting their representatives, stating their "views and proposals" in connection with collective bargaining, ratifying new contracts, and "otherwise . . . participat[ing] in the process by which their rates of pay, rules and working conditions are established" (Pet. App. 5a, ¶ 8).

make (Pet. 10) is that the legal standards formulated by the court of appeals are ones that will impose "the highest conceivable liability," not just on Northwest, but on any defendant in a sex discrimination case. Respondents do not and cannot contest that proposition, nor can they deny that it creates substantial practical reasons for review by this Court.

Sixth, without denying that the size of the judgment in this case is extraordinary and perhaps unprecedented, respondents contend (Br. in Opp. 5) that this is "simply a reflection of the extent to which the members of the plaintiff class have been harmed by Northwest's unlawful conduct." That argument underscores the essential irrationality of the result reached by the courts below in re-examining and rejecting the wage scales set through *bona fide* collective bargaining. During many years of bargaining the stewardesses' unions agreed that a fair wage for the work performed by stewardesses was the one embodied in the contract, while simultaneously agreeing that the fair wage for the numerically insignificant class of pursers — represented by the same union — should be higher. In overturning decades of full, free collective bargaining on this subject, the courts below rejected the conventional process for determining the fair value of wages and ordered wages for the huge stewardess class raised retroactively to the levels considered appropriate only for the relatively few people performing pursers' duties. It is somewhat disingenuous, therefore, to characterize the "compensation" for this "harm" as anything more than an utterly unanticipated windfall.

Seventh, and finally, respondents argue that the legislative policies included in 29 U.S.C. § 251 have nothing to do with this case because those policies only explain why Congress overturned the "portal-to-portal" cases of the 1940's. The legislative findings, however, are part of the Fair Labor Standards Act ("FLSA"), which includes the Equal Pay Act. They establish basic policies that the courts are to apply in construing *various* provisions of the FLSA so as to *avoid* the types of

abuses reached in the portal-to-portal cases, where determinations of unanticipated liabilities conferred windfall recoveries beyond the expectation of either employers or employees. Section 251 is fully applicable here to guide the courts along the path abandoned by the courts below.

# I

To Northwest's contention that the Equal Pay Act cannot apply to salary differentials established in a *bona fide* collective bargaining agreement and without discriminatory intent, respondents interpose three answers: first, that Northwest did not timely raise this contention in the courts below; second, that the factual predicate for the argument was never established; and third, that in any event the argument is legally "frivolous" (Br. in Opp. 6). None of these rejoinders has merit.

(a) **The Issue Was Raised and Decided.** Northwest placed in issue its lack of intent to discriminate under the Equal Pay Act at the first opportunity, namely, in its answer to the complaint. In specification 8, respondents alleged that Northwest had discriminated "solely upon sex" in violation of the Equal Pay Act by paying pursers more than stewardesses. In specification 8 of its answer, Northwest denied this allegation. In addition, both parties presented evidence on the collective bargaining agreements, and there were findings by the district court concerning those agreements and the collective bargaining history. Finally, the court of appeals actually passed on, and ultimately rejected, Northwest's contention that the lack of discriminatory intent was demonstrated by the existence of the *bona fide* collective bargaining agreement (Pet. App. 24c-25c). The issue thus was adequately raised in the trial court and was clearly framed and expressly decided by the court of appeals.

(b) **The Facts Support the Issue.** Respondents also claim that the record is devoid of any facts to support the proposition that the flight attendants' union and Northwest evaluated the purser and stewardess positions during the course of the

collective bargaining process. This defect, according to respondents, precludes a holding that the collective bargaining agreement established the same *bona fide*, non-sex basis for the differential as would a job evaluation plan.

This argument misses the point. In *Corning Glass Works v. Brennan*, 417 U.S. 188, 195-205 (1974), this Court held that a formal job evaluation plan established unilaterally by an employer immunizes the employer from liability under the Equal Pay Act, because it refutes conclusively any allegation that such differentials resulted from an intent to discriminate "on the basis of sex." The formality of the evaluation is not important; what is crucial is that there is compelling evidence that a pay differential is not sex-based, but rather is based on perceived differences in the jobs. The same conclusion flows from the good-faith concurrence of employer and unions that the fair wages for two jobs perceived to be different should also be different.

Moreover, in this case the collective bargaining agreements concluded between Northwest and the cabin attendants' unions did include job descriptions outlining the duties and responsibilities of pursers and stewardesses. Those descriptions (*see* Pet. 6-7) reflected an awareness of significant differences. Thus, far from being "barren," the record establishes conclusively that the pay differential between stewardesses and pursers was established by collective bargaining agreement that reflected a *bona fide* — and thus conclusive — understanding that the jobs were different.

(c) **Discriminatory Intent is Essential.** Respondents' arguments on the merits are no more availing. To Northwest's contention that proof of an intent to discriminate is an integral part of the plaintiff's case in a suit brought under the Equal Pay Act, respondents advance three basic objections. First, they claim that the language and structure of the Equal Pay Act will not bear such a reading. Second, they argue that a requirement of intent would be inconsistent with 29 U.S.C. § 260, which

allows an employer who has violated any provision of the FLSA to avoid paying double damages if his violation was committed in "good faith." Finally, they contend that the courts below in effect found that Northwest had intended to discriminate in establishing the pay differential between pursers and stewardesses.

It is simply not true, as respondents claim, that the language of the Equal Pay Act frees a plaintiff from the obligation to prove an intent to discriminate. The Act makes it illegal to "discriminate . . . on the basis of sex," and the operative verb "discriminate" inescapably implies a notion of intention. There cannot be discrimination within the meaning of the Equal Pay Act if the wage differential is not based on sex.<sup>3</sup> Moreover, it would be anomalous if a sex-discrimination plaintiff under the Equal Pay Act could recover without proving an intent to discriminate, even though race-discrimination or sex-discrimination plaintiffs suing under the more comprehensive provisions of Title VII of the Civil Rights Act of 1964 must, as this Court has recently held, make just that showing. *E.g.*, *National Education Association v. South Carolina*, 46 U.S.L.W. 3452 (January 17, 1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976). There is no evidence that Congress intended to vary the plaintiff's burdens between two antidiscrimination acts passed within one year of each other, and certainly nothing to

<sup>3</sup> Respondents claim that even if the lack of an intent to discriminate could defeat an Equal Pay Act claim, it would have to be pleaded and proved as an affirmative defense. Br. in Opp. 16-17. Because intent is an indispensable element of the plaintiff's case, however, respondents' argument is misplaced. *See Cayce v. Adams*, 439 F. Supp. 606, 608 n.1 (D.D.C. 1977) (Gesell, J.): "The exception [for a 'differential based on any other factor than sex,' 29 U.S.C. § 206(d)(1)(iv)] itself seems redundant, since the statute only prohibits 'discriminat[ion] . . . between employees on the basis of sex' (emphasis added). Obviously, if discrimination is 'based on any other factor other than sex' then it is not 'on the basis of sex' and vice versa."

suggest that the *later* Act was to be more restrictive than the earlier. It is not surprising, therefore, that respondents do not cite, let alone discuss, *any* of the recent cases in which this Court has clarified the requisites of recovery in discrimination cases — including proof of an intent to discriminate on the prohibited basis.

Respondents contend that, because no provision in the Equal Pay Act explicitly immunizes pay differentials established pursuant to collective bargaining agreements, Northwest is seeking to "secure by judicial fiat what industry sought and did not get from Congress" (Br. in Opp. 8-19). That industry sought *explicit* treatment of this issue, however, is not dispositive. In the first place, respondents do not point to any legislative history establishing that Congress had the *contrary* intention or specifically rejected the principle that some witnesses suggested should be expressly protected. As this Court's decision in *Corning Glass* shows, Congress' failure to include explicit language is no proof that the underlying concept has been rejected. While there is no explicit provision in the Equal Pay Act exempting pay differentials established by *bona fide* job evaluations, this Court held in *Corning Glass*, *supra*, 417 U.S. at 201, that such evaluations would be immune under the Act.

Respondents also assert that, instead of according protection for collectively bargained differentials, Congress included 29 U.S.C. § 206(d)(2), which forbids labor unions from causing wage discrimination based on sex (*see* Br. in Opp. 9). Far from suggesting that Congress contemplated that an employer would be held liable for a pay differential established by a collective bargaining agreement in the absence of proof of an intent to discriminate, the inclusion of Section 206(d)(2) establishes exactly the opposite: it provides that a union as well as an employer can be held liable under the Act so long as the requisite intent is shown. The presence of this provision underscores our argument: if a union agrees to a collective bargaining contract embodying wage differentials, the rationale of *Corning Glass* compels the conclusion that the differentials

are *not* "sex-based discrimination" unless the plaintiff specifically proves that the union and employer were animated by a discriminatory motive.

The requirement that an Equal Pay Act claimant prove an intent to discriminate is not inconsistent, as respondents contend, with 29 U.S.C. § 260, allowing a "good faith" defense to double damages. Respondents stretch too far in reading the "good faith" provision in Section 260 as rendering intent and purpose irrelevant under the Equal Pay Act itself. Some provisions of the FLSA create liability without fault or intent; we contend the Equal Pay Act is not one of them. Section 260 — which, as part of the Portal-to-Portal Act of 1947, was enacted some sixteen years prior to passage of the Equal Pay Act — was primarily designed to ameliorate the harsh burden on employers imposed by those provisions of the FLSA that created liability without fault. Nothing in the legislative history of the Equal Pay Act indicates that Congress focused on the relationship between that Act and Section 260, and there is nothing inconsistent between (a) inclusion of a provision that is applicable to all those prohibitions in multifaceted statute that impose liability without fault, and (b) enactment of other prohibitions that require a showing of intent.<sup>4</sup>

Respondents' argument also would prove too much. This Court held in *Corning Glass, supra*, 417 U.S. at 201, that a *bona fide* job evaluation plan immunizes an employer from liability under the Equal Pay Act. If Section 260 were inconsistent with the need to prove discriminatory intent in a case involving collectively bargained differentials, there would have been no room in *Corning Glass* for the Court to treat a *bona fide*

<sup>4</sup> An act may be intentional for Equal Pay Act purposes but still be in "good faith" within the meaning of Section 260. For example, an employer might intend to treat women differently from men in the good-faith, but mistaken belief that he was justified by business reasons that made gender a relevant distinction. Such an employer might be liable under the Equal Pay Act if gender were not a legitimate distinction, but could escape double damages because his judgment was made in good faith.

unilateral job evaluation plan as outside the coverage of the Act.

Respondents make much of findings that supposedly would support a conclusion that Northwest had "engaged in a pattern of intentional sex discrimination" (Br. in Opp. 11). The courts below did not make any such finding, and this Court, if it determines that discriminatory intent was a requisite element, cannot supply it.

The adverse conclusion drawn by the courts below (Pet. App. 55a, ¶ 78; 56a, ¶ 2; 33c-39c) resulted from the legally erroneous syllogism, based upon a misreading of the Equal Pay Act, that if Northwest paid stewardesses less than it paid pursers and if the two jobs were in fact the same, then Northwest *must* have been guilty of discriminating on the basis of sex. Completely omitted from this analysis, however, is the key question whether Northwest actually believed in good faith the two jobs were different and based the differential on that (allegedly mistaken) belief. The courts below necessarily found this question of intent legally irrelevant because they also found that Northwest did believe in good faith that the jobs were different (Pet. App. 1b-2b).<sup>5</sup> The courts below evidently treated the question of discriminatory intent as irrelevant under the Equal Pay Act. To the extent there is any finding of fact on this precise issue, it *supports* Northwest. Accordingly, the legal issue is squarely framed for review by this Court.

## II

Northwest argued in its petition (Pet. 20-25) that the courts below improperly resorted to a test of job comparability — and thereby concluded that the supervisory functions of pursers are "less important" than the functions they bear in common with stewardesses — rather than restricting them-

<sup>5</sup> The court of appeals did not overturn the factual findings about what Northwest actually believed, but simply discounted the legal sufficiency of that belief under 29 U.S.C. § 260 (Pet. App. 62c-68c).

selves, as required by the statute, to determining whether jobs are *equal* in each of the critical respects: skill, effort and *responsibility*. Respondents' sole response (Br. in Opp. 19-20) is that the district court "as a matter of fact" rejected the contention that pursers as a group had extra responsibility and, thus, that there is no factual predicate for the issue presented. Significantly, they do not question Northwest's analysis of the limited role courts must play in passing upon job equality.

The record, however, will not support this attempt to downplay the free-wheeling approach taken by the district court and the court of appeals. Both courts below identified the existence and exercise of supervisory responsibility by pursers (Pet. App. 48a-51a; 15c-16c, 37c-39c). For example, the district court found that, "[a]s automatic 'senior cabin attendants' on all flights to which pursers were assigned, pursers are 'responsible and accountable for the entire cabin service staff'" (Pet. App. 50a, ¶ 69).<sup>6</sup> The district court and the court of appeals were able to avoid the clear implication of these findings that pursers as a group bear additional supervisory responsibility only by concluding that the supervisory functions "are less important than, and require no greater skill, effort or responsibility, than the other functions assigned to all cabin attendants" (Pet. App. 51a, ¶ 69; 37c-38c). Yet, it is precisely this type of calculus that Congress expressly rejected in choosing "equal work" rather than "comparable work" as the governing standard (*see* Pet. 21). At least two other circuits have condemned the use of that calculus. *See Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1173-76 (3d Cir. 1977); *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1258 (5th Cir. 1972).

<sup>6</sup> Respondents acknowledge some of the supervisory responsibilities of pursers (*see* Br. in Opp. 22 n.26), but attempt to denigrate the duties by claiming that they do "not involve an exercise of discretion . . . ." It is ludicrous to suggest that duties of "monitoring and where necessary correcting the work of other cabin attendants" and moving "attendants from section to section to balance workloads" do not require the exercise of discretion.

It is no answer (*see* Br. in Opp. 22-23) that stewardesses act as senior cabin attendants on flights on which there are no pursers. Even then, unlike pursers, they are "'accountable' only for the conduct of service in the section of the aircraft to which assigned" (Pet. App. 50a-51a, ¶ 69; *see also* Pet. App. 14c-15c). But, more importantly, as Northwest explained in its petition (Pet. 8-9), a purser is always the senior cabin attendant on a flight staffed with a purser. The occasions on which a particular stewardess may assume supervisory responsibilities, however, are only random and sporadic. Thus, unlike stewardesses as a class, pursers as a class exercise supervisory responsibility whenever they fly,<sup>7</sup> and Northwest is entitled under the Equal Pay Act to recognize this additional obligation through higher pay for the class.<sup>8</sup>

Nor is it any answer to say that pursers are called on only infrequently to exercise their authority overtly. *See Hodgson v. Golden Isles Convalescent Homes, Inc.*, *supra*, 468 F.2d at 1258. Once the courts determine that the functions differ in terms of responsibility, it is not up to them to evaluate the "amount" of differential. The jobs are not "equal," and the inquiry under the Equal Pay Act is properly at an end.

### III

In asserting that this Court should not disturb the determination that Northwest's establishment of the pay differential was "willful," respondents argue against a proposition that Northwest did *not* advance in the petition. They allege that "Northwest seeks review . . . contending that a violation cannot be 'willful' unless committed in bad faith" (Br. in Opp. 24).

<sup>7</sup> On limited occasions, a flight will be staffed with more than one purser, the senior purser assuming the supervisory responsibilities (Pet. App. 30a-31a, ¶ 41(f)).

<sup>8</sup> There is simply no legal requirement, contrary to respondents' suggestion (Br. in Opp. 22), that Northwest must compensate stewardesses for this sporadic extra service through higher pay on a flight-by-flight basis. *See* Pet. 24 n.13.

Rather than arguing that "willful" conduct requires a showing of "bad faith," Northwest has urged that willfulness means the "intentional violation of a known legal duty" (Pet. 27) — the definition this Court has given the word "willful" in other regulatory statutes. *E.g.*, *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973). Respondents have totally ignored these recent cases.

There is no doubt that the court below failed to apply this definition and instead adopted one that virtually amounts to strict liability. The opinion of the court of appeals expressly states that an employer has acted "willfully" when he "consciously and voluntarily charts a course which turns out to be wrong" (Pet. App. 59c). It is clear, moreover, that the court meant what it said: the decision below allows a finding of willfulness even if an employer reasonably believed that his conduct did not violate the Equal Pay Act.<sup>9</sup>

If expanded civil, and possibly criminal, liability can be imposed upon an employer who "consciously and voluntarily charts a course which turns out to be wrong," that result should only be decreed after plenary consideration by this Court. The court of appeals, moreover, acknowledged a lack of authoritative guidance in this area, indicating that it was not adopting either of "two divergent views" expressed by other circuits (Pet. App. 51c). This Court's pronouncement is now necessary for clarification.

Review on this issue is important whether or not the Court concludes, as urged in Part I, that there can be no Equal Pay

<sup>9</sup> The court of appeals affirmed the district court's conclusion that the Equal Pay Act violation was "willful" and remanded for consideration the district court's determination that Northwest had acted with reasonable, good faith belief that the pay differential was lawful. Although we contend in Part IV that the tests required by the court of appeals for reconsidering Northwest's good faith are impermissibly narrow, the court left open the possibility — actually reached in the district court's initial decision — that Northwest's conduct was both "willful" and *bona fide*.

Act violation in the absence of an intent to discriminate on the basis of sex. If the Court does conclude that discriminatory intent is necessary for liability, the general "willfulness" standard governing the claims period in all FLSA litigation will remain a distinct issue to be confronted in Equal Pay Act cases. Intent and willfulness are not necessarily synonymous. The definition this Court has given in other contexts requires, as a prerequisite to establishing "willful" conduct, not only proof of intent to discriminate, but also knowledge of the legal obligation that forbids the discrimination. If, on the other hand, the Court permits an Equal Pay Act violation to be found in the absence of intent to discriminate on the basis of sex, the gap between the elements of EPA liability and the extension of the claims period will be even deeper. Only a correct interpretation of the "willfulness" requirement will protect from expanded civil, and possibly criminal liability, the employer who, though acting in reasonable good faith, simply "turns out to be wrong."

#### IV

Under 29 U.S.C. § 260, an employer's presumptive liability for double damages may be reduced to single damages if he acted "in good faith" and had "reasonable grounds" for believing that his actions were lawful. In opposing review of the appellate court's rejection of the standards articulated by the district court in applying the statute (Pet. App. 66c), respondents offer their own interpretation of the decision below. The four factors disapproved by the court of appeals may, respondents say, be considered in determining whether the employer subjectively held a "good faith" belief that his actions were lawful, but *not* in determining whether he had "reasonable grounds" for that belief (Br. in Opp. 28-29, 31-32).

The tortured explanation proffered by respondents is just as much at odds with the statute — and with common sense — as the unembellished disavowal by the court below. What, indeed, could be more relevant to an assessment of reasonableness of the employer's belief than the practice of other

employers and the expectations of his own employees, as manifested by their conduct? These are precisely the kinds of external factors against which any employer is likely to test his belief that certain conduct is lawful and reasonable.

Yet the decision below requires the trier of fact to blind itself to these factors in making the reasonableness determination on which the factors indisputably bear. In excluding these factors, the court below observed (in a passage respondents emphasize, Br. in Opp. 29) that an entire industry may be acting unreasonably and that employee acquiescence may be explained as mere timidity. But those are arguments that an Equal Pay Act plaintiff can make to the trier of fact — and respondents did make such arguments to the district court here, only to have the issue resolved in Northwest's favor. They are *not* reasons for stacking the deck against the employer by entirely excluding the factors from consideration.<sup>10</sup>

Repeating the statement by the court below that "legal uncertainty" is the touchstone, respondents assert that Section 260 protects only the employer who reviews the law and finds inconsistent precedents addressing his conduct, some supporting his position and some *challenging* it. This interpretation would, if accepted, result in foolish anomaly: Section 260 would protect an employer who reviews the law and finds some authority calling his conduct into question, but would offer no protection to an employer who, on the basis of industry practice

<sup>10</sup> Compare, e.g., *Texas & Pacific Railway v. Behymer*, 189 U.S. 468, 470 (1903) (Holmes, J.) ("what usually is done may be evidence of what ought to be done"); *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932) (L. Hand, J.) (industry practices and usage are "persuasive" evidence of reasonableness of one worker's conduct, even though they may not constitute the "final answer").

Throughout the entire body of tort law, courts in deciding whether a person's conduct is reasonable almost invariably look to the conduct of others similarly situated and the expectations of other participants in transactions like the one in question. See, e.g., W. Prosser, *Law of Torts* 166-76 (4th ed. 1971).

and his own experience in collective bargaining with his own employees, reasonably concludes that there is no basis to inquire further. No justification for that anomaly appears in the statute or its legislative history, and respondents offer no reason why Congress would have wished to create it.

The very factors ruled irrelevant by the court below are factors Congress emphasized in the declaration of policy (29 U.S.C. § 251) contained in the 1947 Portal-to-Portal Amendments to the FLSA, of which Section 260 is a part. Respondents contend that the declaration of policy only explains why Congress retroactively overruled this Court's Portal-to-Portal "travel time" decisions under the FLSA and is irrelevant in interpreting Section 260 (Br. in Opp. 31-32), but that argument is not supported by authority or logic.

Respondents cite no case holding that a congressional declaration of policy in a comprehensive statute is to be totally ignored in construing some of its provisions, and we are aware of none. More fundamentally, it is totally illogical to argue, as respondents do, that "long-established customs, practices, and contracts between employers and employees" were so important that Congress took the extraordinary step of retroactively overruling judicial decisions disregarding them, and yet at the same time Congress intended to permit the courts to disregard "customs, practices, and contracts" in future decisions under the FLSA (of which the Equal Pay Act is a part). The congressional declaration of policy codified in Section 251 stands as a continuing admonition to the courts not to override arrangements fairly arrived at through collective bargaining. The court below not only disregarded that admonition, but ruled those considerations *irrelevant*.<sup>11</sup>

<sup>11</sup> The protection offered by Section 260 could still be applicable in an Equal Pay Act case if the Court accepts the position — advanced under Part I — that a violation of the Act requires proof of an intent to discriminate on the basis of sex. An employer who establishes a pay differential with an intent to distinguish on the basis of sex may nevertheless entertain a good faith belief that his actions are lawful —

(continued on next page)

## V

There is little need for an extended discussion of Northwest's claim that the court of appeals ignored settled precedent and clear legislative history in failing to apply the 1972 amendment to Title VII limiting backpay awards to the two years preceding the filing of a charge with the EEOC. Respondents have not taken issue with Northwest's exposition of the legislative history of Section 14 of the 1972 amendments, which demonstrates that the court below erred in finding a congressional intent to make the new backpay limitations inapplicable to pending cases. The precedents of this Court are clear that in the absence of such intent, the courts must apply the law in effect at the time they render their decisions, not the law at the time the claim arose.

Whether or not this issue, standing alone, would warrant review by this Court, it is an important issue in the context of this case and presents a simple, clear-cut legal question that turns solely upon a matter of statutory interpretation. It should be decided if certiorari is granted on the other issues.

## VI

In opposing review of the sixth question, respondents do not deny that the court below erred in holding that the 90-day

*(continued from previous page)*

believing, for example, that his employees are not covered by the Equal Pay Act or that gender is a legitimate factor in the peculiar circumstances. Section 260 would provide a basis on which the trial court would have the discretion to assess single damages rather than double damages.

On the other hand, if the Court allows the decision below to stand insofar as it finds a violation of the Equal Pay Act, then review of the court of appeals' interpretation of Section 260 is critical, for this provision will remain as one of the few safeguards providing a measure of protection to employers who reasonably and in good faith conclude that differentially-compensated jobs are different, but then have those beliefs second-guessed and found erroneous.

EEOC filing requirement was not jurisdictional and was subject to equitable modification. Rather, they oppose review on the grounds (a) that the facts are *sui generis*, (b) that no employee may be able to demonstrate reliance and thus take advantage of the estoppel imposed by the court of appeals, and (c) that the court of appeals in any event could have reached a similar result by tolling the Equal Pay Act claims rather than enlarging the Title VII class.

(a) The precise nature of the facts that might support an estoppel is irrelevant to the legal issue presented: Is the EEOC filing requirement a jurisdictional prerequisite or is it subject to "estoppel"?<sup>12</sup>

(b) If the Court grants review of the other issues, this issue should be decided as well to prevent any costly and unnecessary "reliance" hearings as contemplated by the court of appeals. Even respondents concede that those hearings may be pointless, even though as class representatives they would apparently be obliged to pursue them.

(c) Finally, it is somewhat surprising to see a suggestion that the court of appeals fixed upon the wrong remedy since it could have applied the "estoppel" to the Equal Pay Act claims. This belated, though imaginative suggestion, would not in fact leave the case in the same posture, even if the idea had any merit of its own. An estoppel under the Title VII claims would take effect in a certified class action, but because of the "opt in" requirements of the FLSA, 29 U.S.C. § 216(b), there can be no class action for Equal Pay Act claimants. Such claimants are required to opt in affirmatively and prove their own claims. Different, but no less difficult, questions would be raised by respondents' suggestion that perhaps the "estoppel" should

<sup>12</sup> Significantly, respondents concede that they authored the class action notices that the court of appeals found misleading. See Br. in Opp. 35 n.45. Since respondents — the class representatives — were responsible for any detrimental reliance, there is no factual justification for estopping Northwest from raising the time bar. See Pet. 37 n.24.

have been directed at potential EPA claimants. Their comment is simply a transparent attempt to divert attention from the clear conflict between what the court of appeals actually has done and what it had the authority to do in light of this Court's treatment of the Title VII filing requirements. The cavalier ruling of the court of appeals enlarging the Title VII class could have a significant impact on the ultimate judgment if left standing.

### Conclusion

Certiorari should be granted. The judgment below should either be summarily vacated in light of its inconsistency with intervening decisions of this Court or the case should be set for plenary consideration.

Respectfully submitted.

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